

# Articles

## LAW, LAWYERS, AND LABOR: THE UNITED FARM WORKERS' LEGAL STRATEGY IN THE 1960S AND 1970S AND THE ROLE OF LAW IN UNION ORGANIZING TODAY

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### I. INTRODUCTION

In the 1930s and 1940s, it was an article of faith that the National Labor Relations Act (“the Act” or “the NLRA”) and the National Labor Relations Board (“the Board” or “the NLRB”)—the federal statute and agency governing union organizing—were a tremendous boon to the labor movement.<sup>1</sup> Statistics bore out the intuition. Union membership exploded

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1. Although this view was widely held at the time, it was not universal. See “WE ARE ALL LEADERS”: THE ALTERNATIVE UNIONISM OF THE EARLY 1930S 8–10 (Staughton Lynd ed., University of Illinois Press 1996) (quoting union, civil rights, and other leaders at the time of the passage of the NLRA, who expressed the concern that the Act would become an impediment to labor organization and union success). Today there are many more dissenters from the view that the NLRA itself was a gift to labor. See Staughton Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483, n.2 (1981) (questioning the proposition that the Wagner Act led to the rise of organized labor in the 1930s); James Gray Pope, *The Thirteenth Amendment versus the Commerce Clause: Labor*

from four million workers in 1936, the year after the NLRA's passage, to fourteen million a decade later, representing over 35% of the private workforce.<sup>2</sup> Yet today, and for at least the past two decades, it has equally become labor's credo that the NLRB and the NLRA (as amended by Congress and interpreted by the NLRB and the federal judiciary) are massive impediments to unionization.<sup>3</sup> Again, numbers tell a stark story. While unions currently count 15.8 million workers as members,<sup>4</sup> this represents less than 8% of the private workforce, a dramatic decline. And 80% of the three million people who became union members between 1998 and 2003 did so outside of the NLRB-supervised election process.<sup>5</sup>

What does law offer labor? It depends. The specifics of the law in question are critical, as are the make-up and funding of the agency that is charged with implementing it and the economic strength, political clout, and strategic creativity of the unions and employers that it governs. Today's discussions of the NLRA from the union perspective are tinged with desperation about what law does for and to organizing—a desperation that is born of labor's sense that it has lost too many important battles before the NLRB and the courts over the interpretation of the NLRA. In despair, however, workers and their institutions risk losing sight of critically valuable lessons that emerge from a long view of the labor movement about the varied ways that law can interact with collective efforts to improve working conditions. This Article seeks to draw out some of those insights, both through a brief overview of the changing

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*and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1 (2002) (arguing that the Wagner Act's roots in the Commerce Clause worked to the detriment of labor). Other scholars of labor law have argued that the problem lay not so much with the NLRA as with its subsequent interpretation by the courts. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 268–69 (1978); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981).

2. ARCHIBALD COX, *LAW AND THE NATIONAL LABOR POLICY* (1960).

3. For scholarly arguments to this effect, see JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994* (1995); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990); RESTORING THE PROMISE OF AMERICAN LABOR LAW (Sheldon Friedman, et al. eds., 1994); Deborah A. Ballam, *The Law as a Constitutive Force for Change, Part II: The Impact of the National Labor Relations Act on the U.S. Labor Movement* 32 AM. BUS. L.J. 447 (1995); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1569 (2002); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993); Keith N. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685 (2003); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

4. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005* (124th ed. 2004).

5. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828 (2005).

relationship between the labor movement, law, and lawyers during the twentieth century, and, more deeply, through an exploration of fifteen years in the specific experience of one union, the United Farm Workers (“the UFW”), whose history, while unique in many regards, recapitulates and sharpens the points of the larger story.

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The percentage of workers organized by unions has been in a slow-motion freefall for decades. The challenges labor faces are complex. The structure of the economy has changed dramatically over the past fifty years: employers have moved the union bulwark of full-time manufacturing jobs overseas, and service industries now make up the majority of the economy. Work itself is often configured differently, with part-time, temporary, and subcontracted arrangements increasingly substituting for direct employment. All of this is complicated by the AFL-CIO’s long period of ossification during the second half of the twentieth century. Among the many culprits, however, “The Law”—more precisely, the NLRA and its administration by the NLRB and by federal courts—is among the most frequently fingered for this state of decline. Commentators converge on the assessment that a labor law once written to facilitate collective bargaining in this country has come to impede it.<sup>6</sup>

From a union perspective, one problem is the law’s obsolescence. The National Labor Relations Act, initiated by the Wagner Act in 1935 and amended only twice since, by the Taft-Hartley Act in 1947 and then by the Landrum-Griffin Act in 1959, languished without congressional attention during the ensuing half-century as the economy exploded around it. The Act reflects dated assumptions about work and the structure of the economy. In a setting in which indirect employment—subcontracting, independent contracting, and temporary work—is ever more common, the NLRA’s protections cover only direct employees.<sup>7</sup> In a low-wage economy characterized by large-scale undocumented immigration, the Supreme Court has recently stated that employers who fire undocumented

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6. See sources cited *supra* note 3.

7. Prior to its legislative overruling in the Taft-Hartley Act in 1947, the ruling case had been *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944), which stated a much broader standard for coverage of direct and indirect workers. On the changing structure of work, see KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527 (1996); Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153 (2003); Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557 (1996).

workers in retaliation for their union support may be free from any threat of monetary penalty for violating the NLRA.<sup>8</sup> In a globalized world, where workers in the United States compete for jobs with those in China, Vietnam, and Honduras, the NLRA is wholly domestic in its reach.<sup>9</sup> Unions today struggle to organize under a labor law written for another time.

In another sense, though, the law has changed not too little but too much. When passed in 1935, the Wagner Act represented a clear proclamation of a government policy in favor of union organizing. At the end of World War II, the Supreme Court could still state with confidence that the NLRA “sought to . . . bring industrial peace by substituting . . . the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established.”<sup>10</sup> But the NLRA was amended with the passage of the Taft-Hartley Act in 1947, which imposed a range of restrictions on union activity, including a bar on strikes demanding recognition,<sup>11</sup> and a bar on the crucial weapon of secondary pressure.<sup>12</sup> The Taft-Hartley Act also created a series of new unfair labor practices for which unions could be punished.<sup>13</sup> It prohibited “closed shop” agreements<sup>14</sup> and opened the door

8. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2001).

9. *See* *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (stating presumption that laws passed by Congress do not extend beyond U.S. territory); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 251–52 (1991) (citing *McCulluch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)) (finding that a reference to foreign commerce in definition of law’s coverage of “commerce” is insufficient to rebut presumption against extra-territorial jurisdiction); *Computer Sci. Raytheon*, 318 N.L.R.B. 966, 968 (1995) (affirming that the NLRA does not apply extraterritorially). For a critique of this and of the application of the NLRA plant-closing doctrine in a globalized work context, see Terry Collingsworth, *Resurrecting the National Labor Relations Act—Plant Closings and Runaway Shops in a Global Economy*, 14 *BERKELEY J. EMP. & LAB. L.* 72 (1993).

10. *Hearst*, 322 U.S. at 125.

11. Taft-Hartley banned most forms of recognition picketing. *National Labor Relations Act* § 8(b)(7), 29 U.S.C. § 158 (2005). A showing of support from a majority of the workers is required before an employer is required to recognize and bargain with a union. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1969).

12. “Secondary pressure” refers to the union practice—common until barred by Taft-Hartley (*National Labor Relations Act* § 8(b)(4), 29 U.S.C. § 158 (2005))—of calling for a boycott of an enterprise doing business with an employer with whom the union has a dispute (such as a store carrying products made by a manufacturer against whom the union is on strike), and of asking other unions as well as consumers to respect that boycott.

13. Taft-Hartley made most of the employer unfair labor practices set out in the Wagner Act into union unfair labor practices as well. For example, as a parallel to *National Labor Relations Act* § 8(a)(1), which prohibits employer interference with employees’ exercise of the organizing rights guaranteed by § 7 of the Act, Taft-Hartley created § 8(b)(1), which prohibits similar actions by unions. 29 U.S.C. §§ 157–158 (2005). It also render illegal a range of practices unique to unions, and announced new remedies where a union violated the law. Section 7 itself was amended by Taft-Hartley to protect employees who refrained from supporting a labor organization as well as those who supported one. 29 U.S.C. § 157

for states to pass laws prohibiting mandatory union membership<sup>15</sup>—an invitation promptly taken up by a number of Southern states.

Twenty-five years after the passage of Taft-Hartley, the Supreme Court offered quite a different characterization of the NLRA: “The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.”<sup>16</sup> Power realities in the labor context being what they are, it is not surprising that the outcome has been less than favorable from a union perspective.<sup>17</sup> Post-Taft-Hartley, the NLRA’s once protective stance toward collective bargaining was steadily eroded by more than fifty years of NLRB and court decisions restricting worker and union rights, and by stepped-up employer resistance in a context of devastating administrative delays and inadequate incentives for employers to obey the law.<sup>18</sup> From rules that permit

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(2005).

14. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158. A “closed shop” is one in which an employer may not employ any workers who are not already union members. There is a limited exception for pre-hire agreements in the construction industry. NLRA § 8(f), 29 U.S.C. § 158 (2000). In non-“Right to Work” states (*see infra* note 15), however, unions are still permitted to negotiate union security clauses which require all employees to pay union dues, so long as they do not mandate full membership in the union. Such arrangements are also referred to as “agency shop” or “union shop” agreements.

15. National Labor Relations Act § 14(b), 29 U.S.C. § 164 (2005). So-called “Right to Work” laws, currently on the books in twenty-three states, outlaw union security clauses. U.S. Dep’t of Labor, State Right-to-Work Laws and Constitutional Amendments in Effect as of January 1, 2005 With Year of Passage, <http://www.dol.gov/esa/programs/whd/state/righttowork.htm>. In these states, workers hired to work in a unionized shop do not have to join the union or pay dues. The result has been an extremely low level of unionization in such states, and a high burden on those unions that do succeed, as an incumbent union has a duty to represent all workers in the bargaining unit fully whether or not they pay dues. *Id.*

16. NLRB v. Burns Int’l Sec. Serv., Inc., 406 U.S. 272, 288 (1972). AFL-CIO General Counsel Jonathan Hiatt points out that Taft-Hartley left untouched the Wagner Act’s introductory sections, in which Congress set out its belief in the importance of collective bargaining to avoid industrial strife and ensure the country’s economic wellbeing. Telephone Interview with Jonathan Hiatt, General Counsel Jonathan Hiatt, AFL-CIO (Mar. 22, 2005). While these sections continue to provide advocates with rhetorical resources (for an elaboration of this argument, see Ellen Dannin, *NLRA Values, Labor Values, American Values* (unpublished paper presented at the Law & Society Ass’n Annual Conference in June 2005, on file with Journal)), courts have shown little inclination to take guidance from them in uprooting restrictive post-Taft-Hartley interpretations of the NLRA.

17. On those power realities, see Stone, *supra* note 1.

18. See sources cited *supra* note 3. On employer resistance, see Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW*, *supra* note 3, at 75–89. The NLRB is made up of political appointees, and its policies often track their politics. The result has sometimes been a cycling back and forth between pro- and anti-labor positions on the same issue although the overall trajectory has been toward limiting workers’ and organized labor’s rights. In the most recent manifestation of this trend, the George W. Bush board issued several harmful to unions decisions in the summer

employers to carry out extensive anti-union campaigns, to the lack of any meaningful monetary remedies for workers dismissed in retaliation for organizing, to multi-year waits before a court orders a fired worker reinstated, labor law has become an albatross around labor's neck.<sup>19</sup> In 1984 AFL-CIO president Lane Kirkland famously quipped that the NLRA had become so bad for unions that they would be "better off with the law of the jungle."<sup>20</sup> Reflecting this state of affairs, many unions today do their best to organize new workers without using NLRA-established procedures.

Clearly, if unions are to re-emerge as a force to be reckoned with in the United States, much more than the law will have to be transformed. Recent shifts within the labor movement itself reflect the pressure to change. In the fall of 2003, a group of powerful unions, led by the Service Employees International Union (SEIU) and what is now UNITE-HERE, the merged garment and hotel/restaurant workers unions, challenged the AFL-CIO to think more strategically in terms of its approach to organizing, the industries represented by its member unions, and the scale of the collective bargaining agreements it sought.<sup>21</sup> Unsatisfied with the response, SEIU withdrew from the AFL-CIO on the eve of its annual convention in July 2005. It was joined by the Teamsters. UNITE-HERE and the United Food and Commercial Workers soon followed, and these four unions together with several others launched the Change to Win Coalition on September 27, 2005.<sup>22</sup> For the first time since the CIO split off from the

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of 2004. It denied non-union workers the right to have a representative present at a disciplinary proceeding in *IBM Corp.*, 341 N.L.R.B. 1, 2 (2004), a right recently promised to them by the Clinton board in *Epilepsy Found. of Ne. Ohio*, 331 N.L.R.B. 676 (2000). In a case involving a unionization drive by graduate students at Brown University, *Brown Univ.*, 342 N.L.R.B. 1 (2004), it ruled that graduate students are more like students than workers and thus have no right to organize, reversing the Clinton board's opposite determination in a case about NYU's graduate students, *New York Univ.*, 332 N.L.R.B. 1205 (2000). And it has granted review in two cases that raise the question of whether union representation obtained by presenting cards signed by a majority of workers carries the same protection from decertification as representation obtained by election. See NLRB Press Release, Labor Board Grants Review and Invites Briefs to Be Filed in Two Cases Involving Neutrality Agreements (June 15, 2004), <http://www.nlrb.gov/nlrb/press/releases/r2528.htm>.

19. On delays in NLRB proceedings, see GROSS, *supra* note 3; WEILER, *supra* note 3.

20. Cathy Trost & Leonard M. Apar, *AFL-CIO Chief Calls Labor Laws a "Dead Letter"*, WALL ST. J., Aug. 16, 1984, at A8.

21. The group called itself the "New Unity Partnership" ("NUP"). For the platform put forth by the SEIU, see "Unite to Win: A 21st Century Plan to Build New Strength for Working People," <http://www.labornotes.org/nupdiscussion/seiu.pdf>. NUP officially disbanded in January 2005. Harold Meyerson, "Time's Up for the NUP," American Prospect Online, January 18, 2005, <http://www.prospect.org/web/page.wv?section=root&name=ViewWeb&articleId=9054>.

22. Steven Greenhouse, "4th Union Quits A.F.L.-C.I.O. In a Dispute Over Organizing," N.Y. TIMES, Sept. 15, 2005, at A14; Steven Greenhouse, "Breakaway Unions Start New Federation," N.Y. TIMES, Sept. 28, 2005, at A17. Other Change to Win Coalition members unions are the Laborers International Union of North America, the United Farm Workers,

AFL in 1935, the United States has two national organizations of labor unions instead of one.

But it is also true that the time has come for a change in the relationship between the law and the labor movement. The call for such a change usually means: reshape the NLRB and reform the NLRA. From a labor perspective, the Board's funding and power surely need to be augmented and the Act needs to be rewritten.<sup>23</sup> But in the current political atmosphere, the idea that Congress will make meaningful pro-labor changes in the NLRA or the NLRB is no more than a fantasy. Recognizing this, others have called for reform strategies that focus on new approaches to litigating labor cases,<sup>24</sup> or on arguing labor's case in the court of public opinion.<sup>25</sup>

In this Article, I argue for a much broader understanding of the potential synergy between law and labor organizing, and of what lawyers can offer labor. Labor lawyers for unions have received very little scholarly attention of late. When they are discussed, it tends to be in the same leaden tones of despair that are commonly applied to the labor movement as a whole. The implication is that they are mired hopelessly in the glue of the NLRA, toiling to defend organizing efforts that are likely doomed to failure in any case. While labor attorneys do continue to defend union organizing under the NLRA, the past ten years have seen the flourishing of renewed experimentation with what lawyers and legal strategies offer unions outside the confines of settled labor law, as well as the consideration anew of legislative change.

What labor lawyers can do for organizing is, of course, a question of considerable import to the AFL-CIO and the Change to Win Coalition, in particular to their lawyers, who have been grappling with possible answers through their work in local, state and federal forums all over the country. I will describe these efforts—and other creative labor movement lawyering, both historically and today—later in this Article.

This Article, however, is rooted in a different moment in the history of the labor movement, a moment that has been much celebrated as an

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and the United Brotherhood of Carpenters and Joiners of North America. Change to Win Website, <http://www.changetowin.org>.

23. The AFL-CIO strongly supports a labor law reform bill currently pending before Congress, the Employee Free Choice Act of 2005, S.842, 109th (2005). See Part IV *infra*.

24. Dannin, *supra* note 16.

25. See Stewart Acuff, "Fighting for Unions," THE NATION, April 18, 2005, at 5–6 ("The whole community needs to be aware of employer interference in organizing, leading to a groundswell of moral outrage that inspires people to agitate and disrupt business as usual."). Acuff is the AFL-CIO's Director of Organizing and runs the federation's Voice@Work program, which seeks to educate the public about the importance and imperiled nature of the right to organize in the workplace. Voice@Work Homepage, <http://www.aflcio.org/joinaunion/voiceatwork/>.

organizing triumph among “unorganizable” workers: the struggle of Cesar Chavez and the United Farm Workers during the 1960s and 1970s to win contracts for farm workers in the ranches and fields of California and other agricultural states. These workers were then and remain now some of the poorest and most disenfranchised laborers in the country’s history. They are explicitly excluded from the protections of the NLRA, like so many others in fact or in practice today.<sup>26</sup> Many are aware of the basic outlines of the UFW story. Few realize that lawyers and a powerful combination of legal and organizing strategies played important roles in the United Farm Workers’ victories.

In Part II of the Article, I describe the UFW’s use of legal strategies in support of its organizing goals during the early period in which it was not governed by any organizing statute. Drawing on my original research, including interviews with the UFW’s then-General Counsel and numerous other former lead UFW organizers and lawyers, I begin by analyzing the intertwining of law and organizing in the history of the UFW. The UFW used the fact that farm workers are statutorily excluded from the NLRA to its advantage for more than a decade. However, the lack of a state-administered framework for organizing also hampered the union’s efforts to institutionalize its victories.

I then turn to the Union’s eventual successful pursuit of the Agricultural Labor Relations Act (“the ALRA”) in California. In pushing for the ALRA, the UFW was able to craft a law with provisions that surpass what the NLRA offered even at its inception: in the words of one of its architects, the ALRA is “the best labor law in America.”<sup>27</sup>

The ALRA provided the UFW with a set of tools that it used for several years to great effect in order to bring tens of thousands of farm workers into the union. The UFW story is particularly poignant in this regard, as within less than a decade after the ALRA’s passage, the Union was in a shambles. Many factors contributed to the UFW’s decline in the 1980s, and it was, above all, the Union’s weakened state that eventually rendered it incapable of taking advantage of what the law had to offer. But an analysis of the UFW’s interactions with the law also offers some insight into the obstacles a statutory framework can create even as it offers a tool to a union poised to take advantage of its provisions.

In Part III, I analyze the UFW’s legal department as an example of social justice lawyering that offers concrete lessons not only for the labor movement but also for other organizing efforts today. For all the change

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26. “The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer . . . .” National Labor Relations Act § 2(3), 29 U.S.C. § 152 (2005). Others excluded include supervisors, domestic workers, and public employees.

27. Jerome Cohen, *UFW Must Get Back to Organizing: Despite Opposition, Farm-Labor Law Is Still a Potent Weapon*, L.A. TIMES, Jan. 15, 1986, at Metro Part II, 5.



that the UFW experienced when the legal framework for its organizing shifted dramatically with the passage of the ALRA, the question UFW lawyers asked remained a constant: what can law and legal strategies do to build power for this movement at this moment? The UFW's ability to focus exclusively on that inquiry and to experiment—often at high risk—with creative answers was critical to its success. I argue that this capacity, and the Union's avoidance of the "lawyer domination" that scholars and activists often note in lawyer/organizer collaborations, is traceable to the the Union's breadth and strength at the time that it brought lawyers onto its staff, its leaders' recognition of the power of law and the mutual respect among lawyers and organizers that this engendered, and the in-house structure of the legal department, among other factors.

In Part IV, I turn to a brief history of the use of law within the mainstream labor movement, noting the many parallels with the UFW's experience. I trace the flow from the free-form, multi-level legal strategy that characterized the pre-NLRA period, to a labor-lawyer-as-technician model in the middle decades of the last century, to the current resurgence of innovative lawyering as a part of the concerted effort by the labor movement to escape the confines of an ossified labor law, and most recently, to the turn toward the pursuit of a new bill that would bring these new strategies under the NLRA framework.

In Part V, I draw on my examination of the UFW's use of law over the trajectory of its early history and on other examples of labor lawyering, both in the 1930s and 1940s and today, to suggest a framework for understanding what union lawyers are already doing and what they might do further to support the emergence of a rejuvenated labor movement. I focus in particular on the cyclical push-pull between the attractions of lawyering and organizing outside of a governing framework and on the powerful urge to enshrine the right to organize in law, evident in the experience of the UFW and recurring again in the AFL-CIO's work today. Throughout, my argument is this: used thoughtfully (and often unconventionally), with full awareness of its pitfalls, law can play an important supporting role in the rebirth of a movement, both in the workplace and beyond.

## II. THE UNITED FARM WORKERS' USE OF LAW, 1962–1980<sup>28</sup>

The United Farm Workers combined a labor organization for the country's most disenfranchised workers with a mass movement attracting broad support across the continent and beyond.<sup>29</sup> When the UFW was founded in 1962 by Cesar Chavez and fellow Mexican-American community activists in Delano, California, wages on California's large corporate ranches were pitifully low. The UFW's chief opponent was California agribusiness. By the 1960s, agriculture in California had left the small family farm in the dust. From the UFW's birthplace in the southern San Joaquin Valley, large corporate growers whose ranches measured from 10,000 to over 100,000 acres supplied grapes, vegetables, and strawberries to the entire country.<sup>30</sup> Although mechanization was encroaching on work traditionally done by hand, fields were still primarily tilled, planted, and picked by Mexican-Americans, Mexican braceros, migrants from the Philippines as well as other countries, and undocumented immigrants. Wages were pitifully low. Working conditions were inhumane, from the lack of toilets and drinking water in the fields, to the widespread use of "el cortito," the short-handled hoe that required workers to bend at back-breaking angles for hours at a time, to the pesticide residues that hung in the air and clung to leaves, poisoning workers as they labored. When workers protested these abuses, growers had a panoply of tools at their disposal to silence dissent. In the 1950s, from a third to a half of the workers they hired were braceros, whose legal status was conditioned on maintaining their job; uncounted others were illegally present.<sup>31</sup> A quick dismissal or call to the INS could derail many organizing efforts. Where the workers involved were legal permanent residents or citizens, the sheriff

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28. The UFW continues organizing farm workers today, more than a decade after Cesar Chavez's death, under the leadership of Arturo Rodriguez, Chavez's son-in-law. I focus on the period from 1962 to 1980 because it encompasses the height of the Union's legal creativity, the peak of its farm worker representation, and the period of greatest public attention to and involvement with the Union's work.

29. The UFW changed its name several times after its founding in 1962. It began as the Farm Workers Association (FWA), a designation chosen deliberately to avoid many farm workers' negative connotations with the word "union." In 1964 it added "National" before its name (NFWA). In 1966, when the Union merged with the AFL-CIO sponsored Agricultural Workers Organizing Committee, it became the United Farm Workers Organizing Committee (UFWOC). Finally, in 1972 when UFWOC formally affiliated with the AFL-CIO as a full member, it took the United Farm Workers of America (UFW) as its name. Marshall Ganz, *Resources and Resourcefulness: Strategic Capacity in the Unionization of California Agriculture, 1959–1966*, 105 AM. J. SOC. 1003, n.2 (2000) [hereinafter Ganz, *Resources and Resourcefulness*]. To avoid confusion, I use "UFW" throughout.

30. RONALD B. TAYLOR, CHAVEZ AND THE FARM WORKERS 38–39 (1975).

31. LINDA C. MAJKA & THEO J. MAJKA, FARM WORKERS, AGRIBUSINESS AND THE STATE 153 (1982).

or local police could often be relied upon to quell dissent. Farm workers were unprotected by basic national wage and labor laws such as the Fair Labor Standards Act ("FLSA") and the National Labor Relations Act, and growers had cultivated political allies to ensure that no new laws were passed.

As decades of sporadically successful strikes had shown, farm workers were not completely without power. But until the UFW, no farm worker organizing effort had been able to create an organization of farm workers with the creativity, persistence, and stability to fight for on-going union representation and win, much less to negotiate multi-faceted contracts and administer them over several seasons.<sup>32</sup>

Chavez knew that a stable worker organization was necessary to overcome the problem of fleeting victories that other organizing efforts had faced, and he was committed to years of base-building before the union launched its first campaign. To draw farm workers into the effort, the UFW offered a range of services and co-operatives, a response both to the breadth of farm workers' needs and to Chavez's philosophy that a union ought to do more for its members than negotiate and administer contracts.<sup>33</sup> Even with broad support, Chavez realized that the battle to win contracts might be long. But as a farm worker himself and a longtime organizer, he also recognized that farm workers had as-yet untapped sources of power.

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32. For journalistic overviews of the UFW's history, see TAYLOR, *supra* note 30; SUSAN FERRISS & RICARDO SANDOVAL, *THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKERS MOVEMENT* (Diana Hembree ed., 1997). For an oral history of the movement's first years, see JACQUES E. LEVY, *CESAR CHAVEZ: AUTOBIOGRAPHY OF LA CAUSA* (1975). For scholarly analyses of the Union's strategy, successes and failures, see MARSHALL GANZ, *FIVE SMOOTH STONES: STRATEGY, LEADERSHIP, AND THE CALIFORNIA AGRICULTURAL MOVEMENT* (forthcoming June 2006); PHILIP L. MARTIN, *PROMISES TO KEEP: COLLECTIVE BARGAINING IN CALIFORNIA AGRICULTURE* (1996); Theo J. Majka & Linda C. Majka, *Power, Insurgency and State Intervention: Farm Labor Movements in California*, in 6 *RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE* 195 (Richard E. Ratcliff & Louis Kriesberg, eds., 1984) [hereinafter Majka & Majka, *Power, Insurgency and State Intervention*]; Miriam J. Wells & Don Villarejo, *State Structures and Social Movement Strategies: The Shaping of Farm Labor Protections in California* 32 *POL. & SOC'Y* 291 (2004); Ganz, *Resources and Resourcefulness*, *supra* note 29.

33. Among other co-operative ventures, the Union sponsored a credit union co-op, a co-operative gas station and a repair shop. LeRoy Chatfield, who worked for the Union in a variety of capacities (including Chief Administrative Officer) from 1965 to 1973, notes that the existence of these co-ops was very important to Chavez, and that they were attractive to workers, but that they were often not successful as businesses. "Some were disasters; some worked and some half-worked . . . . The books did not square. Loans weren't repaid." Interview with LeRoy Chatfield, Former Chief Administrative Officer, UFW, in Sacramento, Cal. (Feb. 27, 2000) [hereinafter Chatfield Interview]. With the humor of hindsight, lead organizer Gilbert Padilla recalls the frequency with which angry workers would return to the co-operative mechanic shop when a problem "repaired" the day before had recurred as soon as the car hit the road. Interview with Gilbert Padilla, former Lead Organizer, UFW, in Las Vegas, Nev. (Feb. 28, 2000) [hereinafter Padilla Interview].

There was a stable Chicano community in some places, and it was in this community (as opposed to, say, among day laborers, as a previous AFL-CIO farm labor organizing campaign had attempted)<sup>34</sup> that UFW built its base. The majority of the workforce was Mexican or Chicano and shared a religious and cultural identity. Drawing on this identity, the UFW's integration of prayer, religious services, and traditional Mexican symbols such as the Virgin of Guadalupe, with Gandhian tactics such as the fast, created a culture and a spirit of determination that kept the Union going despite repeated defeats.<sup>35</sup>

The UFW developed its unique organizing strategy in response to the particular circumstances of farm labor. In the face of the never-ending influx of new workers too mobile and too desperate to be effectively organized to stay out of work for long, traditional union organizing measures such as strikes and pickets were very hard to sustain. A union could not physically stop the flow of labor into the fields for long because the space was so vast and because courts restricted pickets to impossibly small numbers. And, as migrant workers were well aware, if they demanded union representation they could easily be replaced by temporary workers hauled up from Mexico; by undocumented workers, present in growing numbers; and by workers bused in from other parts of the country.

Despite these obstacles, the collective action of farm workers was important to the UFW's strategy. In some industries, particularly on vegetable ranches, where the workers tended to be more militant young single men rather than the families that migrated to pick grapes, the Union carried out successful campaigns wholly based on worker organizing and strikes. Even where workers were unable to sustain direct pressure for long, the UFW continued to wrest all of the leverage it could from the perishable nature of the crops that its members harvested by cutting off the labor supply at key moments, beginning with its first strike in 1965.

Given the difficulty of winning contracts for mobile, replaceable farm workers through strikes, the UFW also sought to create a social climate in which the existing treatment of farm workers was seen as unjust. The UFW used that climate to generate moral, economic, and political pressure on growers to recognize the UFW as the legitimate representative of farm workers. To supplement and at times replace field organizing, the Union called on middle-class consumers around the country to boycott non-Union fruits and vegetables. This served as an effective year-round economic weapon that worked in complementary ways with the Union's on-the-ground organizing, particularly between 1965 and 1970 (the first grape

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34. MARTIN, *supra* note 32, at 85.

35. See e.g., Ganz, *Resources & Resourcefulness*, *supra* note 29, at 1031, 1034, 1036, 1039 (providing examples of Mexican religious symbols and practices adapted by the UFW).

boycott) and at various times during the 1970s and 1980s (boycotts of other produce and wine as well as grapes). The combination of union and social movement strategies proved successful for the UFW in its early days. By early 1973, the Union could boast an unprecedented 150 contracts with California growers, covering 50,000 workers.<sup>36</sup>

#### A. *The United Farm Workers' Early Legal Strategy*

Although the general outline of the UFW's story is well known, the role of lawyers in that story has remained nearly unexplored in published sources.<sup>37</sup> Yet the creative use of law played an important role in the Union's success. At its peak, the UFW legal department had seventeen lawyers and forty-four paralegals, high numbers indeed in the context of a leanly-staffed and financially-struggling movement.

In the Union's first years, it parceled out its legal work to volunteer lawyers and outside counsel. The volunteers, mostly recent law graduates, largely counseled and represented farm workers on individual matters.<sup>38</sup> Chavez also experimented with hiring a staff lawyer whose principal responsibility was to provide members with services. He became overwhelmed by the volume of work and only lasted for a brief period.<sup>39</sup>

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36. FERRISS & SANDOVAL, *supra* note 36 at 188; MAJKA & MAJKA, *supra* note 31, at 223.

37. A few of the books and articles about the UFW touch briefly on this aspect of the Union's work. See e.g., TAYLOR, *supra* note 30; LEVY, *supra* note 32; MAJKA AND MAJKA, *supra* note 31. See also MARLISE JAMES, THE PEOPLE'S LAWYERS 324 (1973) (Chapter 20, entitled "Jerome Cohen, Attorney, the United Farm Workers Organizing Committee"). There are no comprehensive treatments of the Union's legal strategy. (There are, however, several articles on the ALRA that are also about the UFW's use of that law. See e.g., Wells & Villarejo, *supra* note 32). This Article and my other work on the topic are therefore based on original research, including interviews with CRLA founding attorneys James Lorenz and Gary Bellow; former UFW General Counsel Jerry Cohen; former UFW staff attorneys Bill Carder, Tom Dalzell, Ira "Buddy" Gottlieb, Ellen Greenstone (also a former staff attorney at the ALRB), Peter Haberkamp, Sandy Nathan, and Barbara Rhine; former UFW volunteer attorney Howard Richards; former UFW Executive Committee members and organizers Marshall Ganz, Jessica Govea, Eliseo Medina, and Gilbert Padilla; and former UFW Chief Administrative Officer and Service Center Director LeRoy Chatfield. All quotes in this article are from these interviews unless otherwise attributed, and all references to "interview" refer to interviews carried out by the author unless otherwise indicated. I am also very grateful for access to the Jacques E. Levy Research Collection on Cesar Chavez, held in the Beinecke Library at Yale, and for the primary materials collected by LeRoy Chatfield through the Farmworker Movement Documentation Project, now available online at <http://www.farmworkermovement.org/>.

38. Howard Richards, the Union's first volunteer lawyer, also helped the Union protect its funds from grower lawsuits. Telephone Interview with Howard Richards, Former Volunteer Attorney, UFW (June 28, 2004) [hereinafter Richards Interview].

39. This was Alex Hoffman, who worked for the UFW briefly in the mid-1960s. Interview with Marshall Ganz, Former Executive Committee Member, UFW, in Cambridge,

For more complex legal matters, Chavez turned to outside labor lawyers. But these experiences, too, were frustrating. Farm workers were exempt from the NLRA, but the labor lawyers whom the union consulted were often so mired in its restrictions that they could not respond creatively to the unique possibilities and needs of a farm labor organizing campaign.

Starting in 1966, Chavez began to seek legal support from the newly-founded California Rural Legal Assistance corporation ("CRLA"), one of the first federally-funded legal service organizations. Although CRLA was explicitly prohibited by the terms of its federal funding from representing any union, sympathetic attorneys within CRLA found ways to pursue Chavez's goals through impact litigation. Not unpredictably, this collaboration soon unraveled in the face of tension about goals and strategies. CRLA sought to make decisions about legal tactics that would lead to a victory in court. The Union, on the other hand, often preferred a course of action that was riskier in legal terms but that it judged more likely to advance its long-term organizing goals. But the Union could not be CRLA's client; therefore, it had no official say in the matter.<sup>40</sup> While sporadic collaboration would continue over the years, it was clear by 1967 that CRLA could not consistently provide the UFW with the sort of representation it needed. As Chavez realized, the Union had reached a point where it needed its own sophisticated legal strategist.<sup>41</sup>

For the Union's first general counsel, Chavez chose Jerome "Jerry" Cohen, who had graduated from Boalt Hall and gone to work at CRLA just

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Mass. (May 25, 2000) [hereinafter Ganz Interview].

40. Telephone Interview with James Lorenz, Founding Attorney, CLRA (Mar. 27, 2000) [hereinafter Lorenz Interview]; Interview with Gary Bellow, Founding Attorney, CLRA, in Boston, Mass. (Sept. 10, 1999) [hereinafter Bellow Interview]. At the time of our interview Bellow was a professor at Harvard Law School; in the 1960s he had been a founding attorney at the CLRA. *See also* Stephen B. Hitchner, "California Legal Services, Inc. (C)", John F. Kennedy School of Government Case Program C24-75-011 (1975) [hereinafter Kennedy School Case], and related case studies (C24-75-009, -010, and -012) (dealing with the founding of the CRLA and its internal conflicts). Although pseudonyms are used for key figures in the Kennedy School Case, and some identifying details have been changed, Bellow recommended it to me as an accurate depiction of the events that it describes. It was generated as a teaching tool rather than as a purely factual analysis; therefore, I have restricted my reliance on it to direct quotes from Bellow and other major figures or to points where it is corroborated by at least one other source. The case was later condensed and adapted with some changes into a chapter titled "Lawyers for a Political Movement" in PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 22 (1988).

41. Interview with Jerry Cohen, Former General Counsel, UFW, in Carmel, Cal. (July 22, 1999) [hereinafter Cohen Interview]. "[W]hat Cesar said to workers and what Cesar said to me initially was, 'You are not going to represent individual workers, unless it fits with what you think you need to do to serve the general goal.' So, we downplayed the whole notion of service work." *Id.* "I was going to look at the needs of the Union as a union and I was going to take on only problems related to those needs." JAMES, *supra* note 37, at 326.

months earlier. As a basketball player at Woodrow Wilson High School in D.C., Cohen had sought to abolish fraternities after hearing that a teammate had been beaten during an initiation rite, a battle he continued once he reached Amherst College. By the time he reached law school in Berkeley in 1963, he was primed to enter the current of movement sweeping campuses all over the country. At Boalt Hall he became active in the Free Speech Movement and the resistance to the Vietnam War, and spent a summer at the Meiklejohn Civil Liberties Library, cataloguing civil rights cases so movement attorneys would be aware of what was going on in trial courts around the country. When he joined the UFW, he had already developed a powerful combination of strategic legal thinking, passion for social change, and a love for a good fight. Over the next thirteen years, Cohen and his staff would break new frontiers in their exploration of how law could protect, open opportunities for, and advance the Union's external organizing goals.<sup>42</sup>

Under Chavez's supportive direction, Cohen soon grew into a broad role within the UFW. He gained Chavez's trust swiftly. In 1967, shortly after Cohen began work, an outside labor lawyer working for the UFW had made a practice of automatically signing consent decrees with the National Labor Relations Board on the Union's behalf, agreeing that the Union would not engage in secondary boycotts (that is, boycotts of stores carrying boycotted grapes).<sup>43</sup> Although the NLRA bans secondary boycotts for the unions it covers, the flip side of the exclusion of agricultural work from the NLRA's protections was that farm workers were not bound by the NLRA's rules. In this case, however, there was an argument that the NLRA applied, since nine workers in a commercial peanut shed on one of the ranches were NLRA-covered employees.<sup>44</sup> One of Cohen's first contributions to the Union was to create a new union called "United Peanut Shelling Workers of America," with the AFL-CIO's support, and move the shed employees into it. Once the UFW no longer represented these NLRA-covered workers, it was once again free to use the secondary boycott.<sup>45</sup> This insight

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42. Note the parallels between this approach and "second dimension lawyering" as described by Lucie E. White in *To Learn and Teach: Lessons from Dreifontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 758-60 (1988).

43. "They weren't doing anything out of malice. It's just that . . . the NLRB is the way they understood things. . . . [So] you can't secondary boycott, and we sign those orders. And they didn't ask why." Cohen Interview, *supra* note 41.

44. If a union includes *any* employees covered by the NLRA, the union becomes a "labor organization" subject to the NLRA prohibitions on the secondary boycott. NLRA § 2(5) ("The term 'labor organization' means any organization of any kind . . . in which employees participate.").

45. The UFW repeated this maneuver several times over the following decades, divesting itself of workers in commercial sheds so as not to fall under the NLRA's limitations. In the 1990s, however, the Union made a decision to organize workers outside of the fields as a part of a decision to broaden its reach into the Mexican community. As

had eluded more established labor lawyers, and it earned Cohen Chavez's respect, sparking a sense of confidence that grew over the ensuing years. After seeing "The Godfather" in 1973, Union staff jokingly came to refer to Cohen as Chavez's "consigliere."<sup>46</sup>

Chavez worked with Cohen to develop an approach to lawyering that put the achievement of organizing goals above the achievement of legal victories. For example soon after Cohen started work for the UFW a judge took away the Union's right to use bullhorns in an early strike against the Giumarra company. Cohen proudly returned from appellate court with a writ of prohibition blocking the order, but he received a cold response from Chavez, who believed that the best organizing use of the situation would be to use a bullhorn in violation of the judge's order, get thrown in jail, and attract publicity and support for the cause.<sup>47</sup> Through a series of similar encounters, Cohen and Chavez honed their communication. This process was replicated as Cohen brought new attorneys onto the Union's legal staff, each of whom brought his or her own strengths but who also had to be

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soon as one non-agricultural worker was organized, the entire UFW became subject to NLRA prohibitions on secondary boycotts. The sacrifice was blunted by the fact that the boycott was no longer as important a Union strategy by that time. Cohen Interview, *supra* note 41, and subsequent personal communication with the author; Telephone Interview with Ira "Buddy" Gottlieb, Former Staff Attorney, UFW (Mar. 23, 2005) [hereinafter Gottlieb Interview].

46. "Cesar, and Jerry, and a whole bunch of us went to Bakersfield to see The Godfather. And of course we loved it. And after that, we all talked Godfather for a year, two years, three years. And so Jerry was the consigliere. That's what he was. Because he was clearly part of the action. But he was also in this kind of special role over there." Ganz Interview, *supra* note 39.

47. Cohen Interview, *supra* note 41.

We got some pretty straight communication pretty early in the game because when we struck Giumarra, . . . one of the things this one judge did was that he took away our bullhorns. Turns out, you know, you really can't *do* that. I mean, you have a right to use a bullhorn in rural California . . . I thought. So I told Cesar I was going to take a writ. And he didn't have any faith in that. So he, without letting me know, was planning on just going out there and using the horn and getting thrown in jail. So I bop in one day, after going up to the appellate court in Fresno, and say "I've got this writ of prohibition. We're getting our bullhorns back."

"Oh, fuck!" he screams . . . "I can't—"

I said, "Well, Cesar, you know, you better be straight then . . . If you wanted to violate, let me know."

"Well, I didn't think you were going to get your writ."

I said, "Well, it was pretty clear." And I told him how I got the writ. So from that point on, it was like, "Okay, I'll *level* with Jerry." You know, so we're on the same page.

*Id.*



immersed in the culture of UFW legal and organizing strategy before beginning to work effectively as an integral part of it.<sup>48</sup>

Cohen strategized with Chavez not just about the legal aspects of the Union's work but about its overall direction. He and the attorneys he hired led the fight against restrictive farm labor legislation in several states. They negotiated contracts with growers. But most of all, in the UFW's early years, Cohen and his staff litigated. They went to court to defend the Union, its volunteers,<sup>49</sup> and its members. They went to court to establish legal protections for farm worker organizing. And they went to court to spread the word about the UFW and to bring public pressure to bear on opponents in various ways.<sup>50</sup> In each situation, the question was never only "what are our rights here?," but "how can we best turn this legal situation to the Union's organizing advantage?"

### 1. Defending the Union

Before long, Cohen hired a few young lawyers to work with him.<sup>51</sup> Much of their daily work involved defending the Union and its members. Like all effective organizing efforts, the UFW generated a strong legal backlash. Pickets were stopped with injunctions, protesters were arrested (sometimes unexpectedly, sometimes en masse after the UFW launched civil disobedience campaigns involving up to thousands of workers at a time), striking workers were evicted from farm labor camps, and the Union

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48. None of the other attorneys enjoyed the same level of Chavez's trust as Cohen, despite Cohen's effort to facilitate an eventual shift in legal leadership. Cohen recalls:

[W]hen my kids started to get a little older, and I knew I needed to think about ways of actually earning enough money to put them through college, I told Cesar, "At some point, you know, there might have to be a transition [to another general counsel]." He did not like that. . . . And I would bring Sandy [Nathan, a staff lawyer, to meetings with Cesar]. I thought Sandy had really good instincts. And Cesar once got me aside and said, "You know, it's really chicken shit of you to bring Sandy. I know what you're doing."

Cohen Interview, *supra* note 41.

49. The UFW operated on a "volunteer" basis, under which most staff—including organizers and paralegals—received a weekly stipend (initially \$5 and later \$10 per week) as well as room and board in lieu of a salary. Exceptions were made for lawyers, who received a monthly stipend that began at \$600 (for a total annual salary of \$7,200), and for a few other professionals. Cohen Interview, *supra* note 41; TAYLOR, *supra* note 30, at 14.

50. Gary Bellow has written about these functions of litigation as a part of an organizing campaign, a perspective inspired in part by his work with Chavez and the UFW beginning in 1967. Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996).

51. Until 1973–74, when the UFW mushroomed, the legal staff rarely had more than three or four attorneys at a time, supported by paralegals and a steady stream of law students. Cohen Interview, *supra* note 41; Telephone Interview with Sandy Nathan, Former Staff Attorney, UFW (May 3, 2005) [hereinafter Nathan Interview].

was slapped with grower lawsuits intended to slow down its efforts.<sup>52</sup> It was the legal department's responsibility to mount a defense against these onslaughts.

To facilitate this, during the harvest season staff lawyers lived close to the areas where organizing was most active. In major strikes, a law student was assigned to every picket captain to document how strikers were treated and to negotiate with police.<sup>53</sup> Lawyers were on call when organizers needed them to go to the fields because a sheriff had restricted picketing beyond what was delineated in an injunction. A UFW lawyer or paralegal standing by the side of a road bordering the fields, typewriter balanced on the hood of a car, taking affidavits from workers, became a common sight.<sup>54</sup>

Just as lawyers responded to organizers' calls, so organizers turned members out for hearings. Former staff attorney Barbara Rhine recalls,

[W]hen we went to court . . . we would just pack the courtroom. Boy, were things different if . . . every time the judge had to make a ruling, he was facing an absolutely crowded courtroom, with faces wreathed in wrinkles and hard work, and three languages that had to be spoken, seeing the effect of the way the law works on ordinary people. And we could do that. We could get those people out. . . . But it depended not only on a hotshot legal department, which we certainly had, but also on the hundreds of people on the ground every day.<sup>55</sup>

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52. One example of such a grower lawsuit was a case brought in 1969 by Fresno grape growers against the UFW, arguing that the grape boycott violated antitrust law. Although the growers eventually abandoned the suit, its defense occupied several years of UFW attorney David Averbuck's and later Bill Carder's time. Telephone Interview with Bill Carder, Former Staff Attorney, UFW (Apr. 25, 2005) [hereinafter Carder Interview].

53. Ganz Interview, *supra* note 39. By the summer of 1973, when the Union responded to the devastation of its grape contracts by the Teamsters with a massive campaign of protest and civil disobedience, law students were flooding into the UFW, drawn to its fights against poverty and for civil rights and by its anti-Vietnam War position. Many of those same students were hired by the Union after they graduated. Others went on to work as attorneys for the ALRB, and still others continued on to practice labor law on behalf of other unions. Nathan Interview, *supra* note 51; Telephone Interview with Ellen Greenstone, Former Staff Attorney, UFW (Apr. 21, 2005) [hereinafter Greenstone Interview].

54. Interview with Jessica Govea, Former Lead Organizer, UFW, in New York, N.Y. (Oct. 13, 1999) [hereinafter Govea Interview].

55. Telephone Interview with Barbara Rhine, Former Staff Attorney, UFW (Mar. 27, 2000) [hereinafter Rhine Interview]. See also Alfredo Santos's description of the day in 1974 that he brought Watsonville apple strikers to court in San Francisco where UFW attorney Sandy Nathan was arguing their case. E-mail from Alfredo Santos (July 1, 2004), in CESAR CHAVEZ: THE FARMWORKER MOVEMENT 1962-1993 (LeRoy Chatfield ed., Farmworker Movement Documentation Project CD-ROM, 2005), <http://www.farmworkermovement.org> (follow "Discussion Archive" link, then "July, 2004" link, then scroll to page 2) [collection hereinafter referred to as The Documentation Project]. The Union prevailed in that case, establishing a right to notice before the issuance of a

In the process, many UFW lawyers and law students built strong relationships with the organizers in their area. Rhine describes it as “a . . . partnership . . . a wonderful marriage between what was happening on the ground and in the courts.”<sup>56</sup> Organizer Jessica Govea agreed. “[O]ur legal team was . . . just on . . . [T]hey were there, [and] . . . they worked hard. . . [T]hey had a role.”<sup>57</sup>

Among other aspects of the collaboration, attorneys responded to calls from organizers to free workers from jail or INS detention. They sometimes ended up detained themselves. Attorney Sandy Nathan was jailed in 1975 when he demanded access to a group of workers just arrested by the INS from a Salinas ranch where their votes were crucial in winning an upcoming election. The INS refused, and called the police when he persisted.<sup>58</sup> Two years later, the police arrested Nathan again for insisting on access to twenty-five tomato pickers and a UFW organizer being held in a jail cell. As the door to the cell opened so that an officer could shove him in with the others, the organizer smiled and said to the workers, “See, I told you our lawyer would be here!”<sup>59</sup> On the police report for Nathan’s arrest, under the box marked “Weapon,” the officer scrawled a single word: “*Mouth.*”<sup>60</sup>

## 2. Shaping the Law

As UFW lawyers defended the Union in jail and in court, they also sought to wrest from the Constitution a web of rights—to use bullhorns, to picket, to boycott—that could curtail a judge’s leeway to use injunctions to shut down strikes and provide a basic framework for farm worker organizing in the absence of NLRA coverage. The UFW’s battle with the injunction echoed that of the labor movement in the days before labor law. In the late nineteenth and early twentieth centuries, judges readily issued

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temporary restraining order. *United Farm Workers of Am. v. Super. Ct. of Santa Cruz County (William Buak Fruit Co., Inc., Real Party in Interest)* 537 P.2d 1237 (1975).

56. Rhine Interview, *supra* note 55.

57. Govea Interview, *supra* note 54. This symbiosis did not occur in all places or at all times:

Most of the lawyers lived separately [from organizers] with one another, and worked separately, with great camaraderie on the law stuff. . . . [For them] it was more like a typical law office, albeit energetic and full of good motives. Getting up in the morning, and going to work, and doing a lot of law.

Rhine Interview, *supra* note 55. Even the lawyers who worked most closely with organizers during the agricultural season spent the winters doing legal “projects” divorced from immediate organizing work.

58. Nathan Interview, *supra* note 51.

59. *Id.*

60. *Id.*

injunctions barring or severely limiting strikes and pickets, stymieing union organizing efforts.<sup>61</sup> The passage of the Norris-LaGuardia Act in 1932 had effectively ended this practice under federal law, and the Wagner Act three years later put the final seal on its coffin. But since state law offered ample opportunity to restrict farm labor pickets, and since agricultural workers were exempt from the Wagner Act's protections, the UFW continued to work under a regime of government-by-injunction.<sup>62</sup> One scene from a documentary made by the UFW about the strikes in the summer of 1973 graphically illustrates the problem. A young Tom Dalzell, a UFW legal worker (and later staff attorney) stands by the side of a narrow road running between two fields, as strikers swirl around him. He explains what has just happened:

About thirty minutes ago Lieutenant Yoxsimer from the Sheriff's Department came over and asked everyone to move over to this side of the street, saying there would be no problems if we did, and then about ten minutes ago he came back and decided that there was also an injunction on this side of the street, so we have to be 60 feet from that property line and 60 feet from this property line, which puts us somewhere up in the air. For all intents and purposes, we have no right to picket.<sup>63</sup>

In fighting injunctions, victory in court was often important to Cohen and his staff.<sup>64</sup> Indeed, UFW litigation resulted in a string of important constitutional decisions in California, which to this day guarantee picketers the right to use bullhorns or other amplification to communicate their message to workers in the fields,<sup>65</sup> prohibit the issuance of temporary

61. William Forbath, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 201 (1991).

62. "[T]oday we still have more injunctions than we have letters of the alphabet." LEVY, *supra* note 32, at 155. See also JAMES, *supra* note 37, at 327 (describing injunctions in the context of the Giumarra grape strike of 1967).

63. *FIGHTING FOR OUR LIVES: THE UNITED FARM WORKERS' 1973 GRAPE STRIKE* (United Farm Workers of America, 1974) [hereinafter UFW, *FIGHTING FOR OUR LIVES*].

64. The UFW was aided in its battle with injunctions by the California Supreme Court's *In re Berry* decision, 436 P.2d 273 (1968), which holds that those adversely affected by an injunction can test its constitutionality by violating it. However, if the court eventually finds that the injunction was valid, the violator can be punished. This offered the Union a measure of protection, at least when Cohen and the other attorneys were right in guessing which injunctions would ultimately be held unconstitutional. *In re Berry* put a premium on the UFW legal department's capacity to determine in advance which injunctions would ultimately be held unconstitutional. Chavez recognized the benefits of this work and gave Cohen the time he needed to immerse himself in the relevant law. Recalls Cohen, "Bill [Carder] and I spent hours reading anti-trust law and civil rights law." Interview by Jacques Levy with Jerry Cohen in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library. , (September 20-21, 1993) [hereinafter 1993 Levy Interview with Cohen].

65. *United Farm Workers Organizing Comm. v. Super. Ct. of Kern County*, 62 Cal.

restraining orders against picketers (or whenever First Amendment rights are implicated) unless all parties have received notice of the hearing,<sup>66</sup> and recognize a First Amendment right for organizers and attorneys to have access to migrant labor camps.<sup>67</sup> These legal victories—as well as the lower-level daily triumphs that delayed eviction by a few days or permitted a picket to continue over a weekend—were concretely useful to the Union’s organizers and won the legal department the deep appreciation of leaders such as Dolores Huerta, Gilbert Padilla, and Chavez himself.

### 3. Using Legal Strategies Offensively to Build Power

As important as legal victory could be, the Union often had other goals for its lawsuits as well, and it litigated aggressively to achieve them. Cohen refers to much of his work during this period as “legal karate and the law of the jungle,” using the law as an offensive weapon to advance the UFW’s organizing goals and build power for the Union.<sup>68</sup> The Union threatened and filed lawsuits designed to put collateral pressure on all fronts of its fight: to gain information about particular growers and the industry through discovery, to convince consumers and stores to respect the boycott, to increase the growers’ legal bills and weaken their resolve, and to pressure government officials to change their policies and practices.

The UFW recognized that the discovery phase of a lawsuit (in which parties use written interrogatories and oral depositions to gather information from the other side) could uncover otherwise unavailable data about growers, data that could be very useful in planning boycotts and other organizing strategies. Former CRLA lawyer Gary Bellow described one such deposition that he carried out in an early CRLA lawsuit related to a UFW organizing campaign. When a farm worker appeared at the McFarland CRLA office in 1967, angry that he had been fired from the Bernardi grape ranch for his allegiance to the UFW, Bellow brought suit on his behalf alleging that ranch owners’ sweetheart contracts with the Teamsters had deprived a UFW member of his rights. Within the framework of the lawsuit, Bellow used depositions as a research tool for

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Rptr. 567 (1967).

66. *United Farm Workers of Am. v. Super. Ct. of Santa Cruz County* (William Buak Fruit Co., Inc., Real Party in Interest) 537 P.2d 1237, 1244 (1975).

67. *Id.* at 1242. UFW litigation later played an important role in clarifying the scope of California’s Moscone Bill, a so-called “Little Norris-LaGuardia Act” signed into law in 1976 to echo on a state level the federal protections against labor injunctions. CAL. CIV. PROC. CODE § 527.3 (West 1979).

68. Cohen notes that his ability to use the law offensively, not just defensively, depended on the funding that Chavez provided his department. “[O]nce Cesar saw things could work, by about ’75, I had a lot of resources to deal with.” Cohen Interview, *supra* note 41. Thus they could attack as well as protect.

the union's ongoing campaign.

[T]he next thing I did was to take depositions of the Bernardis—"What subsidiaries do you have? What do you own? How much grape do you ship? How many workers do you have that were not members of the union?"—because they were relevant to the law suit. And suddenly the union realized that with a lawyer it could get information that it couldn't get any other way.<sup>69</sup>

The UFW continued to use depositions this way over time. Growers would sue the Union for damages from the boycott, claiming that it had damaged their market. In response, during discovery the UFW would ask relevant questions about the grower's client base and its geographic reach. As Cohen describes it, the Union won either way: either the grower dropped the suit to avoid giving up this valuable data, or it answered, handing the boycott much-needed information.<sup>70</sup>

During some court battles, the UFW sought to influence both public opinion and the legal outcome by using the courthouse as a stage on which to publicize the farm workers' plight. At several critical moments, for example, the union mobilized members to conduct vigils, sing and pray in courthouse corridors as the judge decided a case involving the UFW. As Cohen recalls, in one case in 1968 where Chavez, then on the thirteenth day of a fast, was cited for contempt of a growers' injunction, UFW members came to court by the hundreds.

[W]orkers all around the building, workers lining every wall of the courthouse. . . . [T]he workers were singing softly, and they were praying. . . . We hadn't been having too much luck in that courthouse before, because it's really the growers' courthouse. But I think everybody that morning knew it was our courthouse.<sup>71</sup>

The grower's lawyer asked the judge to remove the farm workers from the courthouse, but the judge refused, saying "If I kick these workers out of this courthouse, that will be just another example of goddamn gringo justice. I can't do it."<sup>72</sup> As Cohen reflects, "Things started to shift there. That had nothing to do with legal argument. That had to do with just raw organizing power."<sup>73</sup> Another approach was to bring farm workers in to

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69. Kennedy School Case, *supra* note 40, at B-14.

70. 1993 Levy Interview with Cohen, *supra* note 64.

71. LEVY, *supra* note 32, at 280-81 (quoting Jerry Cohen). In this, as in so many other of its strategies, the UFW and its attorneys were inspired by the civil rights movement, where participants also came to witness court proceedings and to pray and sing in courthouse corridors and yards as a way of changing the atmosphere in which legal decisions were made.

72. *Id.* at 281 (Cohen quoting Judge Walter Osborne).

73. Cohen Interview, *supra* note 41. The Union used similar techniques at other times. Taylor describes a different occasion in 1970 during the Union's fight against the grower Bud Antle:

tell their stories in court, or to use affidavits to bring farm workers' experiences in the fields and on the picket line into the courtroom.<sup>74</sup> Unlike many of the big political trials of the 1960s and 1970s, the UFW was not trying to disrupt the actual court proceedings or to reveal the legal system as a fraud.<sup>75</sup> The idea was to change the immediate cultural, political, and moral environment in which legal decisions were made. The press played an important role in this strategy, disseminating the Union's message widely and intensifying the pressure on its opponents.

The Union's focus on a broad range of outcomes from its legal work grew from its doubt that justice for farm workers could be obtained directly from a state court system that historically had favored growers (the result both of law that worked to the growers' advantage and of judges who were inclined to see matters from the growers' perspective). Cohen remarks, "I don't think given the courts I was operating in I had a lot of faith that we could *win* lawsuits."<sup>76</sup> In addition, court results came years after they were

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On December 4th the UFWOC turned out 3,000 farm workers; they ringed the Monterey County courthouse, in Salinas, they lined the front entryway and the hallways. Kneeling or standing, they remained absolutely silent as Chavez and Cohen went inside. The hearing lasted three and a half hours, and, when Chavez refused to call off the Antle boycott, as ordered, the judge ordered him jailed. As he was being led away Chavez shouted, "Boycott the hell out of them."

The UFWOC workers set up a "vigil" around the jail, union priests said a Mass and were arrested by the police for failing to get city permits for public meetings. The UFWOC held rallies, and the widows of Robert Kennedy and Martin Luther King, Jr., came to visit Chavez in his cell. . . .

By December 24th even Judge Campbell had had enough; the thought of what Chavez's supporters might do if their leader was still in jail on Christmas Day helped the judge make up his mind to release Chavez, pending the outcome of the appeals filed by the union's attorney.

TAYLOR, *supra* note 30, at 260–61. Courtrooms were not the only places farm workers packed. As a part of the effort to win the ALRA, the UFW brought members to legislative committee hearings, lobbying meetings, and voting sessions. For example, Cohen describes the farm worker presence at one early committee hearing on the bill as "jam packed and in the hall." Interview by Jacques Levy with Jerry Cohen, Sandy Nathan, and Tony Gaenslen in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library (June 19, 1975) [hereinafter 1975 Levy Interview with Cohen, Nathan, and Gaenslen].

74. Telephone Interview with Peter Haberfeld, Former Staff Attorney, UFW (Mar. 28, 2000) [hereinafter Haberfeld Interview].

75. See Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982–83) (describing the political trial approach). For the memoirs of one of the most famous proponents of the approach, see WILLIAM M. KUNSTLER & SHEILA ISENBERG, *MY LIFE AS A RADICAL LAWYER* (1994) (chronicling Kunstler's life and his work as a lawyer for social movements).

76. Cohen Interview, *supra* note 41. Cohen felt comfortable in the face of the

needed to resolve the issues that arose in organizing. For example, when the UFW was organizing in Texas and the Texas Rangers were beating up farm workers who supported the union, a Houston lawyer, Chris Dixie, filed a case to enjoin the practice. Cohen recalls,

I used to call Chris Dixie about this case. [He would say,] "These things take *tahm*, Jerry." I mean, the strike is long over, and they're still pushing on whether the Rangers should have been enjoined. And the Supreme Court says, by God, five years later, "they should have been." Now there's timely relief for you.<sup>77</sup>

UFW lawsuits often had multiple targets. For example, cases against growers relating to sanitary and health conditions in the field were also intended to pressure regulators to enforce laws on the books, and to convince consumers that it was in their own best interest not to buy grapes. One such suit related to toilets in the fields. Faced with workers' reports that they were relieving themselves in the fields because growers did not provide facilities for them, the legal team built a case with three organizing angles. First, of course, the suit pressured the state to enforce laws requiring field toilets, getting the workers what they needed. Second, with the suit as proof, "boycotters could say, 'Hey, do you really want to eat those grapes? Do you know where those people have to go to the *bathroom*?'"<sup>78</sup> Third, the combination pushed growers a step closer to seeing a settlement with the UFW on the union issue as a favorable alternative to such pervasive pressure if they resisted.

Similarly, but at much greater length and with tremendous effectiveness, the Union sued the government around issues relating to the use of deadly pesticides in the cultivation of grapes. To understand the role that these lawsuits played requires a brief detour into laws regarding boycotts. Unfettered by the NLRA's ban on secondary activity, the Union was free to call for boycotts of stores that sold non-union produce and products. To clarify, a primary boycott is when the union asks consumers

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accusation that he too readily accepted the limitations of the court system—that he should instead have been fighting to reform it. In his inimitable style, he told one interviewer in the early 1970s that he agreed that the courts were in need of reform, "[b]ut you can't chop down a redwood tree with your dick. What you have got to do is isolate the problems you can work on and change and, if you can change that one, then move on to the next one." JAMES, *supra* note 37, at 335. In addition, over time (and particularly through lengthy appeals), Cohen did prevail in many cases. See *supra* notes 65 to 67 and accompanying text.

77. Cohen Interview, *supra* note 41.

78. *Id.* UFW lawyers brought a similar case during the Gallo strike in 1973, which they referred to as the "shitty water suit," and which dealt with the presence of chloroform bacteria in the water supply for Gallo labor camps. Pictures and publicity related to the suit were used in the boycott. Haberfeld Interview, *supra* note 74.



not to buy a particular product grown or manufactured by an employer with which the union has a dispute. A secondary boycott broadens the focus beyond the immediate employer; for example, when the union asks consumers to avoid an entire store because it sells the boycotted product. For the UFW, secondary boycotts were a much more powerful weapon. Consider the task faced by a consumer seeking to support a primary boycott of grapes. Grapes are sold loose, with no markings. To determine whether a particular bunch of grapes for sale at a grocer store was from a union grower, she would need to find a store employee who was willing to scrounge around the storeroom looking for the original crate in which the grapes had arrived, and examine it for the UFW's black eagle stamp. But if the UFW could call secondary boycotts against grocery stores that sold non-union grapes, the consumer's task was made vastly easier: avoid the bad stores and buy at the good. This strategy had the further advantage of magnifying the economic pressure on non-union growers because each supermarket or chain of markets that came to insist on union grapes to avoid the boycott represented the loss of many thousands of dollars in sales, as opposed to the negligible impact from the withdrawal of each individual consumer.

In the context of the grape boycott, highly publicized cases where union members were deprived of basic rights became as important for their effect on the sympathies of potential boycotters as for the outcome of the cases themselves.<sup>79</sup> One morning, union legal worker—and later lead organizer—Jessica Govea brought in several women who were covered in rashes, nauseated and sweating, talking about a white powder on the vines in which they worked. Cohen was distracted by other crises, but faced with Govea's gentle persistence, he eventually approached the office of the local Agricultural Commissioner to request information about the chemicals sprayed in the fields on their ranch. The spraying company immediately got an injunction forbidding the agency from releasing the information to Cohen. The injunction was upheld in court.<sup>80</sup> Technically, this was a defeat for the UFW. But as Cohen says, "people know what is going on if they won't show you the records."<sup>81</sup> Cohen brought the problem to the attention of the Subcommittee on Migratory Labor of the United States Senate Committee on Labor and Public Welfare, chaired by Senator Walter Mondale. The controversy heightened when boycott organizers tested grapes for sale at a Washington, D.C., Safeway and discovered that the levels of pesticide on them were dangerously high.<sup>82</sup> Pesticide-related

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79. TAYLOR, *supra* note 30, at 211.

80. *Cohen v. Super. Ct. of Kern County (Atwood Aviation Co., Real Party in Interest)* 72 Cal. Rptr. 814 (1968).

81. JAMES, *supra* note 37, at 331.

82. TAYLOR, *supra* note 30, at 241. Senator George Murphy then accused Cohen of

cases became a major focus of the legal department's work. As with the toilet litigation, they subjected growers to a triple-whammy: the cost of defending the suit, the price of responding to heightened scrutiny from state regulators, and an economic squeeze from disgusted consumers. The combination pushed growers a step closer to seeing a settlement with the UFW on the union issue as a favorable alternative to continued resistance.

As the pesticide claims proceeded, the Union kept up a steady barrage of other types of lawsuits against growers (for example, back wage claims, tort suits for on-the-job injuries, and cases under California's limited Labor Code),<sup>83</sup> the government (for example, § 1983 actions against government officials for civil rights violations),<sup>84</sup> and others.<sup>85</sup> Meanwhile, although growers and their political allies were the UFW's chief opponents, they were not its only ones. At times, the UFW's most insidious adversary was another union, the International Brotherhood of Teamsters. The Teamsters saw the UFW's success in organizing farm workers as an opportunity to ally with growers, inviting them to sign so-called "sweetheart" contracts that benefited both the Teamsters and the growers while denying workers many of the benefits and protections of UFW representation.<sup>86</sup> Teamster contracts were written without worker knowledge or input, and had few mechanisms for worker participation, no protection from pesticides, and inadequate grievance procedures.<sup>87</sup> Workers who refused to agree to

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having "doctored" the grapes sent in for testing. When Cohen was vindicated, the UFW's credibility in the public eye soared. Telephone Interview with Jerry Cohen, Former Attorney, CLRA (Mar. 30, 2005) [hereinafter 2005 Interview with Cohen].

83. Other examples of lawsuits brought to pressure growers are described by former UFW attorney Chuck Farnsworth.

In one instance, an irrigation district was sued by two union members who claimed that publicly subsidized water was being distributed to growers beyond their 160-acre legal allotment. In another suit, the union itself charged that the California Table Grape Commission was funding anti-union efforts, rather than mere advertising. Both suits were later settled before trial.

Memoir of Chuck Farnsworth, Documentation Project, <http://farmworkermovement.org> (follow "Essays" link, then "Essays by Author" link, then "Chuck Farnsworth 1969–1973" link).

84. Former UFW attorney Bill Carder notes that this is another example of the way that the UFW's legal strategy "took a page from the book of the civil rights movement's lawyers." Carder Interview, *supra* note 52.

85. For example, the UFW sued Safeway in 1973 for selling mislabeled meat. *Avelina Coriell v. Super. Ct. of L.A. County (Safeway Stores, Inc., Real Party In Interest)*, 114 Cal. Rptr. 310 (1974). While Safeway had, indeed, falsely presented low-grade meat as better quality, the Union's primary goal was not to address Safeway's consumer information but to increase the pressure on the grocery chain to respect the grape boycott.

86. Sweetheart contracts, a classic manifestation of union corruption, are ones in which the union and management (who are ostensibly opponents) collude to make an agreement that benefits both of them at the expense of the workers.

87. MAJKA & MAJKA, *supra* note 31, at 202.

Teamster representation were immediately fired. This arrangement worked to the great advantage of both the employers, who understood that the Teamsters would not be “stirring up” their workforce as the UFW would, and the Teamsters, who took in hundreds of thousands of dollars in dues in exchange for minimal work. When the UFW fought back through strikes and pickets demanding free elections, Teamsters turned out by the busload to hurl racial epithets, throw bottles and stones, and beat farm workers and their supporters.<sup>88</sup>

Lawsuits played an important role—and, in the end, became the determinative factor—in the UFW’s strategy to get the Teamsters Union out of the fields. While researching antitrust case law in 1970 as a part of his defense of a suit filed against the Union by Fresno grape growers (their claim was that the Union’s grape boycott was a “conspiracy in restraint of trade,” a classic violation of the Antitrust Act), UFW attorney Bill Carder began to wonder whether there might be an argument that the Teamsters’ and growers’ efforts to undercut the UFW’s representation by signing sham contracts could be cast as a conspiracy to depress wages and benefits, also an antitrust violation.<sup>89</sup> The case that Carder developed out of this idea (and its companion § 1983 civil rights action) survived a 1973 motion to dismiss, entered a massive discovery phase, and eventually settled in 1977 with the Teamsters Union signing a pact in which it agreed to withdraw from farm worker organizing.<sup>90</sup>

Unlike the defensive cases or the constitutional protections that Cohen sought, the point of these particular suits against growers, the government, and the Teamsters was not to win the legal claim through the courts. Here, the Union had as least as much interest in the opportunities the litigation offered along the way as in its legal outcome. Reflecting on the pesticide issue, Cohen notes,

The beauty of working with a movement is that whether you win or lose is sometimes entirely irrelevant, because there’s not a

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88. The Teamsters have a long and shameful history of corruption, in which the UFW rivalry is but one chapter. In 1957, the Teamsters union was expelled from the AFL-CIO on corruption charges; it was not brought back into the AFL-CIO for thirty years. For accounts of this and of the effort to reform the Teamsters, see KENNETH C. CROWE, *COLLISION: HOW THE RANK AND FILE TOOK BACK THE TEAMSTERS* (1993); DAVID WITWER, *CORRUPTION AND REFORM IN THE TEAMSTERS UNION* (2003).

89. Unions covered by the NLRA (such as the Teamsters) are ordinarily exempt from antitrust law. Carder’s theory was that the egregiousness of the Teamsters’ actions rendered this an exception. The resulting sweetheart agreements between the Teamsters and the growers, he argued, were not normal labor contracts, but evidence of a “conspiracy to artificially regulate the price of work.” Interview by Jacques Levy with Jerry Cohen in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library (Oct. 15, 1995) [hereinafter 1995 Levy Interview with Cohen].

90. Carder Interview, *supra* note 52; MAJKA & MAJKA, *supra* note 31, at 246.

defeat you can't turn into some kind of victory. If we had won on that original pesticide thing and gotten the records then we would have had them. But, even if we lose . . . [w]e . . . get to present our case . . . and you begin to talk about pesticides and you begin to drive an issue home . . . . So it doesn't matter if they say we can't see the records because then we go to the public and say that they won't show us the records.<sup>91</sup>

Such lawsuits were most important as a way to get data, to "illustrate issues" to the public and to increase pressure on merchants to the point where they would assist the boycott, to push the Teamsters to end interference with UFW contracts, and to move ranch owners to agree to unionization. Once the Union had achieved its goal, these claims were often traded or dropped.<sup>92</sup>

### B. *The ALRA*

In December of 1972, as the UFW's grape contracts approached their expiration date, Teamsters president Frank Fitzsimmons appeared at a function for the Farm Bureau Federation (a growers' organization) and

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91. JAMES, *supra* note 37, at 330–31. UFW staff lawyers recall many such instances of the attitude that "all legal outcomes can be organizing victories." For example, staff attorney Barbara Rhine spoke with Cesar Chavez the night before a big hearing in which the UFW was fighting the eviction of striking Gallo workers en masse from the Gallo labor camp. Rhine feared that they would lose the injunction, and said as much to Chavez. "He said, '[L]ook, Barbara, don't think of it that way. Think about this: if we lose, we'll get pictures [of the evictions] and how it's going to help the boycott.' In other words, whatever happens, we're going to exploit it for its full advantage as organizers." Haberfeld Interview, *supra* note 74. (Haberfeld, then Rhine's husband, was present at the conversation). The Union did win the injunction that day, but the workers were later evicted individually. Rhine, who was first in her class at Boalt Hall, recalls this ending as an important jolt of realism about the possibilities of change through legal talent. "I bought them a little time, that's all, and the battle went on. The people who own the property get to control who lives there. Not all the Boalt law degrees and Law Review and all the intelligence in the world could make a difference in that." Rhine Interview, *supra* note 55.

92. Though using lawsuits as leverage was often effective, it raised important ethical issues, particularly when claims of individual workers were involved, as they often were. Cohen and the UFW legal team strategically chose cases involving individual workers against whom growers had committed torts or California Labor Code violations, and filed their claims as "bee-stings in the battle." Additionally, claims of individual workers were folded into larger suits such as the pesticides claim. These sorts of cases raise the specter of conflicts of interest, as the outcome the workers wanted as individuals and the outcome the Union sought as an organization were not necessarily the same thing. Cohen dealt with these conflicts by maintaining full disclosure before the fact. He also observed that many workers saw the winning of a union contract as better serving their individual interests than victory in a particular case. Cohen Interview, *supra* note 41. For a fuller discussion of the ethical implications of this issue with regard to individual workers, see JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 209–11 (2005).

exhorted growers to form an alliance with the Teamsters.<sup>93</sup> They listened well. When the UFW contracts expired in 1973, 90% of the grape growers signed agreements with the Teamsters.<sup>94</sup> There were no elections; workers were not consulted in the process. The UFW was left reeling, with no more than 6,500 workers remaining under its representation.<sup>95</sup> It was a dark and bitter time for the Union.

Fast running out of money and desperate to rebuild, the UFW debated whether to seek the passage of a state law that would prevent such raids and create explicit rules for the organization of agricultural workers.<sup>96</sup> The UFW's staff and volunteers had wavered over the years about whether the Union stood to lose or win in seeking to create a law that would govern its conduct.<sup>97</sup> On a practical level, the likelihood of wresting a good law from the California legislature seemed dim for many years. More fundamentally, Chavez and others had observed how legislation had seemed to take the wind out of the sails of the civil rights movement in the South.<sup>98</sup> Certainly wholesale adoption of the NLRA seemed like the wrong solution, given the increasingly evident way that law and the NLRB was coming to shackle the labor unions that it governed.<sup>99</sup> Some leaders further argued that the UFW's freedom from labor legislation was a key to its success, allowing it to operate as a social movement with a wide range of tactics, free of the bureaucracy of the union establishment.<sup>100</sup> But the AFL-CIO

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93. UFW, *FIGHTING FOR OUR LIVES*, *supra* note 63.

94. The Teamsters were not bound by the rules prohibiting AFL-CIO unions from raiding each other's worksites, as they had been expelled from the AFL-CIO in 1957 for corruption.

95. FERRISS & SANDOVAL, *supra* note 35, at 188; MAJKA & MAJKA, *supra* note 31 at 223.

96. Jerry Cohen recalls: "I had known enough about the way the rest of the labor movement was operating to know that with a law, eventually down the road comes a whole superstructure of anti-union lawyers. And . . . no matter how positive the administration, there's the whole question of getting yourself involved in the administrative nexus. Might be necessary, but until it was, we were having too much fun. . . . And we were winning." Cohen Interview, *supra* note 41.

97. It is important to remember that the time before the ALRA was not a "lawless" one for the UFW. The Union still worked against a backdrop of formal rules and entitlements (property, contract, criminal, immigration, etc.) that hugely favored growers. Likewise, it is wrong to talk about the pre-ALRA period as one free of state intervention in organizing. The state intervened often, whether to protect growers' property rights or, less often, to permit protest as a constitutional right. To the extent there was favorable law to work with—for example, the post-Civil War amendments to the Bill of Rights—the UFW often stood on the legal shoulders of movements that had gone before. Thus the ALRA did not create but instead reframed state interventions. It realigned the forces but did not create the force field. For a fuller discussion of this issue see *infra* Part III.

98. LEVY, *supra* note 32, at 529.

99. Ronald B. Taylor, *Why Chavez Spurns the Labor Act*, *THE NATION*, April 12, 1971, at 454; Cohen Interview, *supra* note 41; Nathan Interview, *supra* note 51.

100. Nathan Interview, *supra* note 51.

was offering a strike fund of \$1.6 million to the Union on the condition that it make serious efforts to win an agricultural labor relations law.<sup>101</sup> And in 1974, victory in such an effort began to seem conceivable when Jerry Brown replaced Ronald Reagan as governor of California. The Union decided that its best hope for rebirth was to create an administrative framework that would guarantee the UFW access to farm workers in the fields, bar sweetheart deals between Teamsters and growers, and set legal rules for elections and bargaining that would allow the UFW to recover the contracts it had lost.<sup>102</sup>

Cohen worked with the Union's organizers and lawyers to develop a set of proposals that reflected what they had learned during the UFW's last hard-fought decade about the sort of protections that would facilitate farm labor organizing. Cohen brought these ideas to Chavez, who later recalled that

Jerry Cohen made a list of all the issues as he saw them. Then he met with the board and with me for many sessions. We went over all the issues. I also met with the field office staffs, the people who had been involved with the strikes, the workers, and we just touched every single base we could. There was tremendous input. So Jerry finally drew up an ideal bill.<sup>103</sup>

One approach might have been to scale down what the Union wanted so it more closely resembled the realm of the possible. Although the Union had sought a minimalist bill the year before, in 1975 Chavez and Cohen did not

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101. Cohen recalls: "In '73 we lost all those grape contracts because the Teamsters signed those sweetheart deals. And . . . [Cesar] and I had gone back to see Meany about . . . getting some help, and Meany sort of conditioned the help on us finally agreeing to some kind of labor law. . . . [W]hat they wanted was a commitment, a commitment that we'd go for the law." Cohen Interview, *supra* note 41. See also MAJKA & MAJKA *supra* note 31, at 221, 223. The AFL-CIO's reasons for seeking to bring the UFW under a labor law were complex. On the one hand was a protective urge, a sense that such a law was the only way for the UFW to vanquish the Teamsters and succeed on the mainstream labor movement's terms, by winning election victories, negotiating collective bargaining agreements, and collecting substantial dues. On the other was a desire to control the UFW, to rein it in. The AFL-CIO felt pressure from its member unions most affected by the UFW's secondary boycotts, in particular those covering supermarket workers such as the retail clerks and butchers unions. These unions feared that their members would lose jobs due to the boycott. The retail clerks went so far as to take out full-page newspaper advertisements opposing the UFW boycott. MAJKA & MAJKA *supra* note 31, at 230. More generally, there was a sense within the mainstream labor movement that the UFW was disruptive, eating up more than its share of the public's energy and attention. There was friction between the UFW and the AFL-CIO around the UFW's opposition to the Vietnam War (which the AFL-CIO supported), its radicalism, and its social movement approach. The AFL-CIO saw in labor law the possibility of re-shaping the UFW into something closer to the standard labor union mold of the time. Nathan Interview, *supra* note 51; Cohen Interview, *supra* note 41.

102. 1975 Levy Interview with Cohen, Nathan, and Gaenslen, *supra* note 73, at 4-5.

103. LEVY, *supra* note 32, at 528.

take that route. Looking at all of the ideas on the table, they decided, "We'll just load up—we'll ask for everything. We'll ask for the whole damn thing."<sup>104</sup> It was not clear how far their political power could take them, but they were unwilling to compromise in advance of discovering the answer.

The initial bill that Jerry Brown introduced, drafted by his Secretary of Agriculture Rose Bird (later Chief Justice of the California Supreme Court), was far from the Union's wish list, indeed so far that the UFW responded with protests around the state. Months of back and forth ensued, as Cohen negotiated with Brown, Bird, and various attorneys. Eventually, Cohen succeeded in convincing Brown to change his bill to reflect most of the UFW's provisions, and the Union gave the measure its full support.

The UFW's cause was aided by some measure of ambivalence about the bill among the Union's usual opponents, the Teamsters and the growers. The Teamsters feared that the bill's prohibition on employer-supported unions could be used to invalidate its sweetheart contracts with growers who far preferred its lesser demands to those of the UFW. On the other hand, the Teamsters realized that an agricultural labor relations law could also work in its favor. In particular, formal elections could legitimate Teamster contracts in the vegetable fields that had been the subject of fierce and continuous battles with the UFW.<sup>105</sup>

For the growers' part, most put their considerable clout to work to defeat the UFW-supported bill. But some of them, too, had reasons to support it. Growers had already been limited by California courts in the degree to which they could retaliate against union supporters, so they had less to lose than one might think. They wanted an end to the UFW's outlaw tactics and they hoped that a law would prohibit the secondary boycotts that had worked so effectively for the Union.<sup>106</sup> In addition, there were important ranches where consumer boycotts, rather than direct worker support for the UFW, were driving the growers' engagement with the Union. If the law passed, unionization would be decided by a worker vote, and the vote on those ranches would likely not be in the UFW's favor. As Cohen himself told Brown during their negotiations, Gallo (owned by one of Brown's college roommates) was such a ranch.<sup>107</sup> Indeed, the Gallo company became one of the bill's strongest supporters among the growers, joined by others who thought that an election system was their best bet for

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104. Cohen Interview, *supra* note 41.

105. In the end the Teamsters also won the right to hold on to those contracts until new elections were held. Wells & Villarejo, *supra* note 32, at 296. On all of the machinations between the various unions with an interest in the bill, the UFW, and the governor's office, see 1975 Levy Interview with Cohen, Nathan, and Gaenslen, *supra* note 73.

106. Wells & Villarejo, *supra* note 32, at 303. For a full discussion of the parameters of secondary pressure eventually permitted under the ALRA, see *infra* note 115.

107. 1975 Levy Interview with Cohen, Nathan, and Gaenslen, *supra* note 73.

avoiding the constant pressure to recognize the UFW under which they had lived for the previous decade.<sup>108</sup>

Farm labor legislation had some other unlikely backers. Supermarket owners, who were tired of the UFW's business-disrupting protests, sought a bill that would ban secondary boycotts and bring customers back to their doors.<sup>109</sup> Some county administrators and sheriffs endorsed the bill, hoping it would free them of the burden of caring for thousands of UFW protesters in their jails as they had the previous summer.<sup>110</sup> The backing of this range of usually conservative forces eventually would make it easier for legislators who might otherwise have opposed the bill to vote in favor of it.

There were five other proposals for governing agricultural labor relations in the California legislature in 1975.<sup>111</sup> To avoid a showdown in the Assembly Labor Relations Committee, Brown made the compromises necessary to win endorsements from enough key players (including grower representatives and conservative legislators) that his version was the one guaranteed to emerge onto the floor.<sup>112</sup> Busloads of UFW members and volunteers lobbied in Sacramento. Meanwhile, Cohen worked behind the scenes, negotiating with Brown and Bird to make the final legislation as favorable to the farm workers as possible. Once the bill reached the floor, rural legislators proposed last minute amendments—for example, a ban on strikes during harvest-time—that would have seriously harmed the UFW's cause. The bill amendments were defeated.<sup>113</sup> In a special legislative session called by Brown at Chavez's urging, the bill passed the Senate thirty-one to seven and, three weeks later, the Assembly by a vote of sixty-four to ten.<sup>114</sup>

The ALRA as passed offered the UFW a powerful new framework for organizing. It did not include all of the UFW's proposals. The law

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108. Cohen, Brown, and former UFW staff LeRoy Chatfield generated a list of the bill's pro-grower features, which Brown used to sell the ALRA to growers: the presence of a "no union" option on the ballot; a prohibition on strikes to demand that the grower recognize the union; giving up the secondary boycott at delivery doors; and the "industrial unit," organizing all workers on a ranch into one bargaining unit rather than a series of subdivisions by task (arguably advantageous because it protected the grower from serial strikes and disruptions from different units at different times). 1975 Levy Interview with Cohen, Nathan, and Gaenslen, *supra* note 73.

109. LEVY, *supra* note 32, at 531; Wells & Villarejo, *supra* note 32, at 9; Cohen Interview, *supra* note 41.

110. LEVY, *supra* note 32, at 531; Cohen Interview, *supra* note 41.

111. MAJKA & MAJKA, *supra* note 31, at 238.

112. *Id.* at 238–39.

113. FERRISS & SANDOVAL, *supra* note 32, at 208.

114. MAJKA & MAJKA, *supra* note 31, at 239. The effect of the special legislative section was to permit the law to go into effect in the summer of 1975, rather than waiting for January of 1976. *Id.* The UFW wanted the earlier date so that long-time strikers on the Gallo ranch would qualify to vote in an election under the ALRA "pre-existing strikers" rule. Cohen Interview, *supra* note 41.



allowed the Teamsters to hold onto its contracts until elections were held, and it banned picketing to enforce a secondary boycott by a union that had not yet been elected to represent the workers in question.<sup>115</sup> Nonetheless, the UFW's political clout and Cohen's negotiating acumen were clearly reflected in the bill signed by Brown. Brown would later claim it as "[t]he greatest accomplishment of my administration."<sup>116</sup>

The law began with an unabashed endorsement of the right of farm workers to organize, with a preamble that explicitly stated the Act's goal as "guaranteeing justice for all agricultural workers."<sup>117</sup> The law itself contained provisions that conventional unions could only dream of. It guaranteed farm worker unions a seven-day turnaround for secret ballot elections (compared to the thirty to forty-five days that are standard in the NLRA context), an essential time frame for such a highly mobile work-

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115. Cohen argues that the UFW sacrificed little with regard to its secondary boycott capacity under the ALRA. As he points out, under the ALRA, unions that had not yet been elected were still allowed to call for secondary boycotts, to publicize the call through the media, to carry out "human billboarding," and house meetings, and to distribute literature in front of a grocery store urging consumers to respect the secondary boycott. An elected union could add secondary picketing to its repertoire. See CAL. LAB. CODE § 1154(d)(4) (West 2005) (setting out limitations on secondary *picketing* for unions not yet elected as bargaining representative, but permitting other forms of publicity); CAL. LAB. CODE § 1154.5 (West 2005) (setting out permissible range of secondary boycotts). Given all this, and that a boycott succeeds or falls on the strength of its broad community base, not its picket line, Cohen argues that the prohibition on patrolling before grocery store doors was no great loss. The UFW had also conceded the right to picket supermarket delivery doors to ask that other workers (such as truck drivers) refuse to do business with boycotted markets, but in any case, they had not been getting the cooperation of other unions' members at delivery doors because respecting such a secondary boycott request would have rendered their unions vulnerable to a lawsuit. Telephone Interview with Jerry Cohen, Former General Counsel, UFW (Mar. 30, 2005). For a review of the Act's secondary pressure provisions, see *Secondary Boycotts and the Employer's Permissible Response Under the California Agricultural Labor Relations Act*, 29 STAN. L. REV. 277 (1977).

Confused by the dense wording of the secondary boycott section, growers at first believed that the ALRA had eliminated it entirely. Cohen recalls,

We structured the boycott so that it took the boycott away, and then in these complicated paragraphs gave it back. So that the grower organ, The Packer, wrote this thing congratulating Brown for banning the secondary boycott. And then after the damn thing passed, it was like, "Whoops! We're sorry. We're wrong."

Cohen Interview, *supra* note 41. See also Tracy E. Sagle, *The ALRB—Twenty Years Later*, 8 SAN JOAQUIN AGRIC. L. REV., 139, 153 (1998) (noting graver confusion); "Secondary Boycott Not Outlawed," THE PACKER, May 31, 1975 (editorial by grower newspaper admitting it had misunderstood the ALRA to prohibit most secondary boycotts).

116. Philip Martin, *Promise Unfulfilled: Why Didn't Collective Bargaining Transform California's Farm Labor Market?* (Ctr. for Immigration Studies Backgrounder, 2004), at 2, <http://www.cis.org/articles/2004/back104.html>.

117. 1975 CAL. STAT. AND AMENDMENTS TO THE CODE, 3d Extraordinary Sess., c. 1, § 1, p. 4013.

force and one that severely limited a grower's ability to run an extended anti-union campaign; where a strike was in progress the turnaround was only forty-eight hours.<sup>118</sup> It created more liberal rules for when strikers could vote in elections<sup>119</sup> and gave workers much stronger remedies for employer violations than the NLRA, including, the "make-whole" remedy, through which a grower who had failed to bargain with the union in good faith could be required to pay workers the difference between their current wage and what the contract rate presumably would have been after good faith bargaining. This remedy has no corollary in the NLRA. It also established a right to "industrial" bargaining units that grouped workers doing different jobs on the same ranch together for organizing purposes, a configuration that the UFW had favored.<sup>120</sup>

On top of these legislative provisions, the UFW was able to make the law more advantageous by using its political clout to guide the choice of members for the first Agricultural Labor Relations Board (ALRB), resulting in a pro-UFW super-majority of four to one. As it drafted regulations for the ALRA's implementation, that board made key additions to the law, including giving the Union the right to a list of the names and addresses of the workers at each ranch they were organizing (referred to as "Excelsior lists," after the NLRB case that gave rise to the right under the NLRA), putting symbols on the ballots so that farm workers who could not read and write would be able to put their mark next to the UFW's easily-

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118. CAL. LAB. CODE § 1156.3(a) (West 2005). Elections had to take place during peak season and could begin as soon as the grower's workforce reached 50% of peak numbers. CAL. LAB. CODE §§ 1156.3(a)(1) (West 2005). This was to prevent fewer (but more powerful) year-round workers from making the decision about unionization for migrants.

119. In both the ALRA and the NLRA, workers on strike to protest their employer's unfair labor practices ("unfair labor practice strikers") are permitted to vote in any election at the workplace, but there are limitations on the voting rights of workers who have gone on strike to demand a raise, increased benefits, or a better contract ("economic strikers"). The NLRA limits all economic strikers to voting in elections that occur within twelve months of the commencement of the strike (unfair labor practice strikers are not limited in this way). *W. Wilton Wood, Inc.*, 127 N.L.R.B. 1675 (1960). By contrast, the ALRA only disqualifies economic strikers after twelve months if they have been permanently replaced. CAL. LAB. CODE § 1157 (West 2005). Significantly, for strikes initiated within 18 months prior to the ALRA's effective date, the ALRA permitted the ALRB to open elections to workers who had been on strike for economic reasons for up to three years prior to the ALRA's effective date. *Id.*

120. CAL. LAB. CODE §§ 1140–1166 (West 1960). The UFW favored industrial units (rather than so-called "craft" units, which would have grouped workers by the job they did) because they grouped less powerful migrant workers with more powerful classes of workers such as irrigators and tractor-drivers, thus increasing migrants' chances of moving up to better jobs and permitting the UFW to coordinate bargaining and, if necessary, strikes across a ranch. For further comparisons of the ALRA and the NLRA, see MARTIN, *supra* note 32, at 94–95; Wells & Villarejo, *supra* note 32, at 293–97; Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 175–79 (2003); Sagle, *supra* note 115, at 139.

recognizable black eagle, and creating access rules that guaranteed at least two organizers the right to speak freely with workers in the fields at defined times during the work day. The UFW had wanted these provisions from the beginning but felt it would be unable to get the law passed with them included. When the ink dried on the final rules, California could boast only the second pro-organizing farm labor law in the country (the first being the Hawaii Employment Relations Act,<sup>121</sup> passed in 1945 before Hawaii was part of the United States), one that set a gold standard for any other states that cared to follow.<sup>122</sup>

### C. *Legal Work in the Wake of the ALRA*

For all of its beauty on paper, the UFW recognized that the ALRA would mean nothing unless the Union could generate enough pressure to make it a real tool for farm workers. The UFW had a bare three months between when the law passed and when it went into effect to completely revamp its organizing effort. Meeting the challenge required intensive teamwork between the UFW's legal and organizing departments, the sort of tight coordination that was only possible because of the years of collaboration that preceded it.

In the legal department, a group of lawyers who had prided themselves on their expertise in civil rights law and the battle against injunctions but had little or no experience representing conventional unions suddenly found nothing but a few pages on the calendar between themselves and full-fledged labor law practice. Cohen split the legal department in two, one half to manage ongoing litigation, the other—under the direction of Sandy Nathan—to work on ALRA matters. The department quickly rose to its peak of seventeen lawyers, forty-four paralegals, and a large number of volunteer attorneys playing supporting roles. Nathan set law students to work creating a hornbook on NLRB

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121. Hawaii Employment Relations Act, HAW. REV. STAT. ANN. § 377 (LexisNexis 2004). The Hawaii Employment Relations Act covers almost all workers excluded from the NLRA, including (but not limited to) agricultural workers. HAW. REV. STAT. ANN. § 377-1(3) (LexisNexis 2004).

122. Cohen notes with amusement the questions he now gets about his tactics in creating the law.

That law came from ten years of organizing, boycotting, striking, people going to jail. That's where the law came from. You know I get . . . some of these folks doing doctoral pieces. "How did you negotiate the law?" You'd have to be an idiot not to get that law. That law was the result of ten years of pressure. Now, we played it out right, you know. We played what hand we were dealt to get what we needed. But that is the product of all the work that those folks did and Cesar . . . was crucial in organizing that.

Cohen Interview, *supra* note 41.

practice, which the lawyers studied avidly.

In the Union as a whole, organizers were being called back to California from the boycott and deployed in the fields to prepare workers for elections and tell them about their new-found rights. Lawyers, organizers and paralegals strategized on how to approach organizing under this new system. One of the UFW's most important goals for the summer of 1975 was to communicate to farm workers that the ALRA's protections truly shifted the age-old power relationships on the ranch. The Union had "to make the law real in people's experience as something that stood between them and the grower."<sup>123</sup> Later, once the ALRB opened, the Union would seek to "maneuver the board into demonstrating its power in relation to the growers."<sup>124</sup> But in the interim, the onus was on UFW organizers and lawyers, who fanned out across the state to talk with workers about their new rights under the law. As they went into the fields, they discovered that the growers were flouting the ALRA's rules about organizers' rights to enter the fields to talk with workers, and the Teamsters were resisting being confined by any legal restrictions at all. The jungle would not so easily be tamed by the proclamation of a law to govern it.

To turn a paper law into a real one, the UFW had to work with the new agency created by the ALRA. The ALRB opened its doors on September 2, 1975. On the surface, it looked to be an ideal partner for the UFW. After all, four of five initial board appointments had reason to favor farm worker interests over growers (indeed, one was former lead UFW staffer LeRoy Chatfield, at the UFW's explicit request), and Brown's pro-UFW views were well known to the general counsel he appointed, Walter Kintz.<sup>125</sup>

Matters on the ground, however, proved considerably less simple. Few ALRB staff spoke Spanish, and according to observers at the time—including a fellow board attorney—many treated farm workers with suspicion or outright distaste.<sup>126</sup> The new agency was at once utterly disorganized and instantly bureaucratic. As former board attorney Ellen

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123. Ganz Interview, *supra* note 39.

124. See also Wells & Villarejo, *supra* note 32, at 305 (quoting Cohen: "For farm workers to have faith in the law, you have to show them that they can demand enforcement.").

125. Kintz, an NLRB attorney, was favored by the growers for the job. Cohen attributes Brown's appointment of him to pressure generated by the growers after they discovered they had been duped into thinking that the ALRA banned the secondary boycott. "Once the growers had good lawyers read this bill, they became unhinged," Cohen recalls. "And so they raised holy hell and . . . they were able to convince [Brown]" to appoint Kintz. 1993 Levy Interview with Cohen, *supra* note 64.

126. Nathan Interview, *supra* note 51; Jacques Levy Interview with Ellen Greenstone, former Staff Attorney, ALRB (Sept. 25, 1975) (cited with Ms. Greenstone's permission) [hereinafter 1975 Levy Interview with Greenstone].

Greenstone recalls, “the first thing they taught us at orientation was how to fill out an expense report.”<sup>127</sup> Many of the ALRB staff (including Kintz) were brought in from the NLRB, and were steeped in its rules and accustomed to its glacial pace, which was ill-suited to a new law requiring that elections be held days—not months—after workers filed a petition. More than a hundred UFW members were waiting the morning that the board opened to file election petitions from twenty-one different ranches, having spent the previous night in a vigil outside the ALRB office in Salinas.<sup>128</sup> Many others followed on their heels. The board threatened that processing scores of elections would take months and it sat on hundreds of unfair labor practice petitions the UFW subsequently filed to protest workers fired for their union support.

Meanwhile, growers continued to resist the law with impunity. Three weeks after the ALRB opened for business, Sandy Nathan, the UFW’s lead attorney for ALRA matters, commented: “The growers are really lawless at this point. To them it’s perfectly permissible to disregard the law and to do everything they can to subvert it. And the board is not recognizing that. . . . They’re just looking at it that everybody is a good faith participant.” Responding to growers’ demands, board staff regularly excluded workers from pre-election conferences; when the board finally responded to UFW pressure to include them, it did so without translation (or with an offer to translate only the “important stuff,” leading Sandy Nathan to suggest that they conduct the conference in Spanish and “translate the important stuff into English for the employer”).<sup>129</sup> The board regularly acceded to grower requests that elections be held on grower property and accommodated growers’ unsubstantiated claims that the workforce was not yet at peak. Most aggravating, Kintz proved indifferent to the UFW’s complaints and its sense of urgency.<sup>130</sup>

The UFW had spent the summer promising workers that the new law would protect them, and with every firing that went unaddressed, every election petition that languished in the ALRB’s hands, every organizer denied access, that promise receded.<sup>131</sup> The stakes were high, and the

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127. Greenstone Interview, *supra* note 53.

128. Interview by Jacques Levy with Sandy Nathan in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library (Sept. 24, 1975) [hereinafter 1975 Levy Interview with Nathan].

129. *Id.*

130. This description of the ALRA’s early days is drawn from both Jacques Levy’s interviews with UFW attorney Sandy Nathan and ALRB attorney Ellen Greenstone in September of 1975, less than a month after the ALRB opened, and from my interviews with Greenstone, Nathan and Cohen.

131. See Posting of Alberto Escalante (Dec. 26, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow “Discussion Archive” link, then “December, 2004” link, then scroll to page 168) (“And while you’re trying to tell the farm workers to not

Union responded in its customary style. As Nathan recalls, "We would raise hell . . . Everything was a fight! Everything!"<sup>132</sup> As before, lawyers and organizers worked closely together. As former lead organizer Ganz recalls, "[S]ometimes it would be a sit in, and sometimes it would be a motion";<sup>133</sup> either way, the Union sought to influence the development of board policy and practice. "Every step of every election procedure was contested, fought over—the order in which the regional offices accepted petitions, the scheduling of elections, election rules, worker education, pre-election conference proceedings, unfair labor practice processing, and throwing elections out. The whole process was political and subject to pressure."<sup>134</sup> The Union carried out sit-ins at ALRB regional offices and in Governor Brown's office, brought workers to protest at pre-election conferences from which the board had excluded them, and called the ALRB incessantly to prod it to prioritize the cases where speed was of the essence and to deal with the rest expeditiously. Cohen called for Kintz's resignation at the first ALRB election hearing, and the UFW ratcheted up the pressure when he refused to step down.<sup>135</sup>

By November 1975, Brown, at first a bystander to the chaos, responded to the Union's demands by creating a task force of experienced outside attorneys to train board staff and prosecute growers themselves. The ALRB began working more effectively to enforce the new law.<sup>136</sup> After the task force was created, the UFW was often successful in drafting ALRB officials on the ground to illustrate the new landscape of power under the ALRA. As Ganz recalls, "the law said that board agents were supposed to advise workers of their rights, and so forth. Well, we insisted that the board agents go out to the ranch, get rid of the foremen and supervisors, have a meeting with the workers, and explain what their rights

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worry about being fired . . . they've just seen a UFW organizer being hauled off to jail for trespassing?").

132. 1975 Levy Interview with Nathan, *supra* note 128; 1975 Levy Interview with Greenstone, *supra* note 126. "Farm workers' history with laws are that they are on the books and they don't get enforced . . . and the trick was to let people know . . . this was one law that . . . was going to be enforced." *Id.* Cohen later noted: "Well, the Democratic administration [of Brown] wouldn't have enforced the law without pressure, and we gave 'em pressure. . . . It was a war until Brown understood we were damn serious about it." 1993 Levy Interview with Cohen, *supra* note 64.

133. Ganz Interview, *supra* note 39.

134. Wells & Villarejo, *supra* note 32, at 305 (quoting Ganz).

135. Kintz resigned in the winter of 1975–76. MAJKA & MAJKA, *supra* note 31, at 245.

136. 1975 Levy Interviews with Nathan, *supra* note 128; Cohen Interview, *supra* note 41; Greenstone Interview, *supra* note 53. Sam Cohen was appointed to lead the task force; other attorneys included pro-farm worker champions such as CRLA attorney Maurice "Mo" Jourdane. Cohen: "We were constantly pressuring them and that's how we got the task force. That's how we got enforcement of the law." 1993 Levy Interview with Cohen, *supra* note 64.

were.” Each time ALRB agents ordered a foreman to leave a meeting or arrived to tell workers about their rights was a small victory on the road to UFW representation.<sup>137</sup> Elections soared, the board moved quickly on the representation petitions that workers filed, and victories began to pile up. By the UFW’s contemporaneous tally, a staggering 45,915 farm workers voted in 382 elections during the first five months after the ALRA’s passage: an average of seventy-six elections per month.<sup>138</sup>

These early, exhausting, euphoric months ground to an unexpected halt when the ALRB closed its doors on February 6, 1976. Confronted with a tidal wave of elections, it had run through its annual budget in less than half a year. For the next eight months the ALRB remained closed, as growers (stunned by the over 90% level of union victory in the early elections) and Teamsters (who lost more often to the UFW than they had anticipated) pressured legislators to pass amendments to the legislation before it granted the agency further funding. Lawmakers refused to amend the ALRA, but nor could they muster the two-thirds majority required to pass an emergency appropriation. In the meantime, several pro-UFW members of the ALRB resigned.<sup>139</sup> During this time, the UFW mounted a large-scale effort to win Proposition 14, which would have guaranteed the ALRB permanent funding and required voters statewide to ratify any proposed changes to the ALRA, thus securing the board a future independent of the state budget process. The UFW spent more than a million dollars on the initiative, but growers poured \$2 million into a campaign to defeat it, and it lost in the fall of 1976 by a considerable margin.<sup>140</sup> In the process, however, the UFW succeeded in pressuring legislators to authorize the budget that the ALRA needed to resume functioning.<sup>141</sup>

When the ALRB reopened on December 1, 1976, the volume of elections had fallen considerably, although it was still impressive. Over 150 elections took place in each of the following two years, with over 9,000 farm workers voting per year. The UFW won 55% of those

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137. Jerry Cohen recalls Mo Jourdan—in his task force role as an ALRB agent—standing up on the bus carrying workers to fields owned by anti-union stalwart Bruce Church and telling the workers they had the right to organize under the ALRA. “This,” he observes, “was mighty powerful medicine.” 1993 Levy Interview with Cohen, *supra* note 64.

138. “United Farm Workers of America, AFL-CIO: Elections Statistical Tally Up to and Including February 6, 1976: Statewide Results,” Jacques Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book Library and Manuscript Library, Box 29, Folder 563, File 31.

139. Proposed amendments included elimination of the access rule, an extension of the election period from 7 to 21 days, and lower penalties for growers who violated the law. MAJKA & MAJKA, *supra* note 31, at 244–45.

140. FERRISS & SANDOVAL, *supra* note 32, at 208.

141. Wells & Villarejo, *supra* note 32, at 304.

elections; the Teamsters won 32%.<sup>142</sup> By January 1978, the UFW had brought 25,000 new workers under contract through ALRA procedures and represented two or three times that number on ranches where growers were resisting negotiating contracts.<sup>143</sup> The benefits for farm workers were immediate: wages rose by 30% to 50%, and many received health and pension benefits for the first time in their lives.<sup>144</sup> At its height two years later, the UFW had over 50,000 members under contract and as many as 50,000 more “affiliated” farm workers.<sup>145</sup> The Union’s reputation stretched across the country and indeed the globe.

#### D. *The Unraveling*

The ALRA offered the UFW a remarkable opportunity, and the UFW seized it and held on. And yet within a decade of the ALRA’s passage, the UFW was all but dormant, as was the ALRB.<sup>146</sup> Many factors contributed to this decline. On all fronts during the 1980s, organizing became more difficult. An influx of undocumented workers increased competition and made raising wages harder.<sup>147</sup> Meanwhile, growers fought back against the advantages the ALRA gave farm workers. They used ALRB appeals to delay decisions on elections, and built support in Sacramento for their efforts to re-shape the political landscape that had brought the ALRA into being.<sup>148</sup> But the UFW had faced political opposition, intense labor competition, and grower resistance before, and triumphed. Internal changes in the UFW seem to have played the critical role in its inability to

142. *Id.* at 301.

143. Theo J. Majka & Linda C. Majka, *Decline of the Farm Labor Movement in California: Organizational Crisis and Political Change*, 19 CRITICAL SOCIOLOGY 3, 14–15 (1992) [hereinafter Majka & Majka, *Decline of the Farm Labor Movement*].

144. Martin, *supra* note 116, at 2.

145. Exact numbers on UFW membership are very hard to obtain. In 1981, the UFW was claiming 108,000 members, while admitting that number represented “every worker who has spent ‘one hour to one year’ working for a grower under a union contract.” Wayne King, *Chavez Faces Internal and External Struggles*, N.Y. TIMES, Dec. 6, 1981, at 1. Scholars and close observers seem to concur that the Union had from 50,000 to 70,000 workers at its peak in the early 1980s. MAJKA & MAJKA, *supra* note 31, at 251; MARTIN, *supra* note 32, at 91; Wells & Villarejo, *supra* note 32, at 303.

146. Jennifer Scholz, *Duke’s ALRB: The Farmer’s Friend*, CAL. J., Aug. 1987, at 375; Diane Wagner, *Seeds of Change at the ALRB*, CAL. LAW., March 1987, at 22. See also Majka & Majka, *Decline of the Farm Labor Movement*, *supra* note 143, at 23–28; Wells & Villarejo, *supra* note 32, at 315 (both discussing ALRA changes under California’s Republican governors).

147. See PHILIP L. MARTIN, *PROMISE UNFULFILLED: UNIONS, IMMIGRATION, & THE FARM WORKERS* (2003), especially Chapter 8; DOUGLAS S. MASSEY, ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* (2003), especially chapters 5 and 6.

148. See sources cited *supra* note 146.



respond effectively to this round of challenges.<sup>149</sup>

Beginning in the mid-1970s, Chavez—who was always known for the close eye he kept on even the smallest administrative details of the management of the UFW—began to show signs of intensifying concern that his control over the Union was threatened. Others have explored this turbulent period in the UFW's history in greater depth.<sup>150</sup> For the purposes of this Article, a few factors seem particularly relevant. In 1977, the Teamsters withdrew from farm worker organizing as part of the settlement of the long-running anti-trust lawsuit brought by the UFW. The Teamsters' presence had been a thorn in the Union's side but also a goad to continual organizing.<sup>151</sup> With the threat of competition in the fields gone, Chavez turned inward. He required union staff to participate in a psychological game run by the cult-like group Synanon to hash out internal problems, led the union into a retreat from the critical work of field organizing, and funneled increasing amounts of the UFW's money from the fields into direct mail and politics.

Among other concerns, Chavez focused on what he feared were two independent power bases developing within the union: the legal department (located in Salinas rather than at union headquarters in La Paz), which had become increasingly central to the UFW's organizing strategy after the passage of the ALRA; and Salinas-based vegetable workers organized through ALRA procedures by Ganz and Govea among others. Those workers' independence and strength rendered them more confident of their ability to strike for better pay and conditions and therefore less reliant on the social movement strategies that Chavez had to offer than the Union's traditional mainstay, grape workers, who needed considerable outside support (as with the boycott) to prevail against growers.<sup>152</sup> The thousands of new workers brought under UFW contracts through ALRA procedures heightened Chavez's concerns as well. Managing the large number of workers organized under the new law and administering the contracts the Union had negotiated required more sophisticated administrative systems than the UFW had. But to move in that direction, with an increased focus on contract administration and institutionalization, would have meant

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149. Majka & Majka, *Decline of the Farm Labor Movement*, *supra* note 143, at 16–23; Wells & Villarejo, *supra* note 32, at 300–08.

150. See Frank Bardacke, *Cesar's Ghost: The Decline & Fall of the UFW*, *THE NATION*, July 26, 1993, at 130; Michael Yates, *A Union Is Not a "Movement"*, *THE NATION*, Nov. 19, 1977, at 518; Majka & Majka, *Decline of the Farm Labor Movement*, *supra* note 143; Wells & Villarejo, *supra* note 32.

151. Wells & Villarejo, *supra* note 32, at 305–06.

152. Cohen Interview, *supra* note 41; Ganz Interview, *supra* note 39; E-mail from Doug Adair (June 2, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow "Discussion Archive" link, then "June, 2004" link, then scroll to page 20); Wells & Villarejo, *supra* note 32, at 307.

acknowledging a shift in the UFW's identity from a social movement to a union, something that Chavez in particular was loath to do.<sup>153</sup>

Matters came to a head when Cohen, Ganz and Govea supported a call by organizers and paralegals that they be paid a regular salary, a move away from the "volunteer stipend" system that applied to most field and service staff and toward a more institutionalized system. The lawyers also asked for an increase in their base monthly salary from \$600 to \$1000. Disagreeing on both fronts, Chavez insisted that the UFW needed to go in the opposite direction, returning to its all-volunteer movement roots. He focused on the lawyers' request. In mid-1978, he proposed to the Executive Board that it begin this process by de-funding the UFW's lawyers and requiring that they participate in the volunteer system like most other staff.<sup>154</sup> The board split along generational lines, with younger members opposed to Chavez's proposal (such as Ganz, Govea, and Eliseo Medina) losing to a slim majority of older UFW leaders. Stripped of their income, most of the lawyers left in 1978 and 1979.<sup>155</sup> During the same

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153. See also Cohen Interview, *supra* note 41; Email from Tom Dalzell (June 15, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow "Discussion Archive" Link, then "June, 2004" link, then scroll to page 153).

154. The proposal also involved moving the lawyers from Salinas, where most were stationed, to the Union's rural headquarters in La Paz. Chavez asked Cohen to stay on, with full pay, and train a new group of lawyers who would work from La Paz as volunteers; Cohen, considerably less sanguine about the fungibility of legal talent than Chavez, refused. Instead he agreed to remain for eighteen months in a limited capacity to negotiate contracts and argue a pending case before the Supreme Court. Cohen Interview, *supra* note 41.

Although one interpretation of this turn of events might be that Chavez's proposal represented the erupting of some long-simmering resentment of the Union's lawyers, people who were close to him at the time say that it appeared to be a more immediate response to Chavez's growing fears that some lead organizers were undermining his work, a way of re-asserting his control and cutting off possible legal support for their efforts, than a fundamental belief that the legal work was in tension with the organizing. Chavez had occasionally expressed concern to Cohen about the level of resources that the legal department consumed, but this was inevitably coupled with his recognition of the power that lawyers helped the UFW to build. Cohen Interview, *supra* note 41; Ganz Interview, *supra* note 39.

155. The UFW operated with a considerably smaller legal department in the wake of Cohen's departure, with a few lawyers working from La Paz for the Union's then-standard \$10/week plus room, board, a small clothing allowance and the repayment of school loans. Their efforts were supplemented by outside representation and pro-bono assistance. They continued to do ALRB cases, and also defended the UFW when it was sued by growers or its own members. Gottlieb Interview, *supra* note 45. See also E-mails from Ellen Eggers (May 24, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow "Discussion Archive" link, then "May, 2004" link, then scroll to pages 85 and 87) (discussing changes under new legal department and legal strategies); E-mail from Ellen Eggers (June 2, 2004), Documentation Project, <http://www.farmworkermovement.org> (follow "Discussion Archive" link, then "June, 2004" link, then scroll to page 27) (discussing changes under new legal department and legal strategies). The need for paid representation eventually reasserted itself, however, and for many years now the UFW has

period, Chavez put down attempts by workers to run their own candidates for the Union's executive board, and he froze out or fired almost all of his most experienced staff, including Ganz, Govea, Medina, and many other key organizers. Cohen stayed in a limited capacity until late 1980, when he too departed. The impact of these changes on the UFW's organizing capacity was immediate. Before any of the transformation of immigration patterns or the political landscape that would mark the 1980s, the ALRB witnessed a steep drop in elections and union election victories starting in fiscal year 1978-1979.<sup>156</sup>

Chavez ultimately succeeded in retaining control of the UFW, but at a price. Over the course of the following decade, the Union organized few new workers, and many of its contracts expired unattended. With the 1982 election of Republican Governor George Deukmejian, growers succeeded in changing the state-wide political landscape.<sup>157</sup> Deukmejian appointed David Stirling, a former Republican assemblyman, as General Counsel of the NLRB. Stirling proved so hostile to union interests that he was labeled "the farmer's friend."<sup>158</sup> The UFW was so angered by the change in the

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been represented by its current General Counsel, Marcos Camacho, who serves the union through his private firm. Camacho is the graduate of a project that Chavez initiated in 1972, through which the UFW put promising community members into a legal apprenticeship program, after which they were admitted to the practice of law (without ever having attended law school) once they passed the California Bar exam. In 1976, Tom Dalzell became the first UFW-sponsored candidate to pass the bar and enter practice through this program. Telephone Interview with Tom Dalzell, Former Staff Attorney, UFW (June 13, 2005) [hereinafter Dalzell Interview]. See generally Fred Alvarez, *Apprentices Take Law Into Their Own Hands*, L.A. TIMES, Oct. 10, 2004, at B1 (discussing the apprenticeship program and the UFW's experience with it).

156. Wells & Villarejo, *supra* note 32, at 302 ("In sum, what is most striking about the ALRA election data is the sharp drop in election activity and union wins after 1977-78 (with the exception of the 1980 upswing), coupled with a rise in the proportion of decertification and "no union"-won elections."). Wells and Villarejo go on to remark that the 1977-78 decline came at a time "when political climate, growers' strategies, and labor market conditions were all favorable" to the UFW. *Id.* at 304. "Sharp drops in the number of elections held, votes cast, and union-won elections after that point coincided with a shift in union policy that interrupted the forms of pressure exertion that had proved so effective." *Id.* See also *id.* at 16-17.

157. Under Deukmejian and then (to a somewhat lesser extent) his Republican successor Pete Wilson, ALRB members who had seen the law as a tool to encourage farm worker organizing were replaced with others who supported growers. Majka & Majka, *Power, Insurgency and State Intervention*, *supra* note 32, at 220-21; Wells & Villarejo, *supra* note 32, at 318. Many pro-worker ALRB staff resigned: within eighteen months of Stirling's appointment, forty-two of 107 staff members departed. Scholz, *supra* note 146, at 376. The board began to dismiss a large percentage of unfair labor practice charges filed by the Union against growers. Wells & Villarejo, *supra* note 32, at 310. By this time, however, the UFW had largely withdrawn from the fields, and it is unclear that the UFW would have been in a position to take advantage of the ALRB's protections even had the agency been operating at full capacity.

158. Scholz, *supra* note 146.

ALRB's focus and strategy that in 1986—the year that Deukmejian appointees came to control a majority of seats on the ALRB—it put its political weight behind an unsuccessful effort to de-fund the agency it had worked so hard to bring into being a mere decade before.<sup>159</sup> At the time of Chavez's death in 1993, the Union had between 5,000 and 10,000 members.<sup>160</sup> In the mid-1990s and early 2000s, the UFW began to regain some vigor under the leadership of Arturo Rodriguez, Chavez's son-in-law. The Union received renewed attention and support from the AFL-CIO for its campaign to organize strawberry workers after John Sweeney's election in 1995, although that effort did not prove successful on a large scale.<sup>161</sup> Despite some noteworthy legislative victories, the venerable and embattled UFW has not yet managed to regain the public prominence or the level of worker representation it enjoyed in its heyday.<sup>162</sup>

### III. ANALYSIS OF A COLLABORATION

What made the UFW legal strategy so successful? And what insights does the broad sweep of the UFW's experience both outside a formal governing law and within one suggest about what lawyers can offer unions and about the opportunities and obstacles law creates for a labor movement?

As the UFW's story so amply illustrates, good lawyers for labor (or for any movement) have one consistent touchstone: the question "what can legal strategies do to help the union win organizing victories"? Although the question is a constant, the answer varies tremendously with context. A labor movement has very different opportunities to use the law to advance its goals depending on the legal, political, economic and social environment in which it operates. Important factors include the laws that explicitly or potentially govern its conduct or its opponents', the courts through which its claims are channeled and the judges before whom they are heard, and the receptivity of politicians and government officials at a range of levels to its cause, among others. At the same time, labor's capacity to take advantage of opportunities to use law to build union power depends on the

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159. *Id.* at 376; Wagner, *supra* note 146, at 23.

160. Wells & Villarejo, *supra* note 32, at 303.

161. MARTIN, PROMISE UNFULFILLED, *supra* note 147, at 79–80; ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 103–104 (2003). See generally David Bacon's articles on the UFW strawberry campaign and photographs of strawberry workers collected on his website, <http://dbacon.igc.org/FarmWork/farmwork.htm>.

162. The UFW in 2001 and 2002 succeeded in getting two new pro-farmworker bills signed into law in California. One imposed high penalties on growers and contractors who fail to pay farm workers legal wages. The other created a pilot program of first-contract mediation for agricultural workers and their unions.

presence of a particular type of lawyer (and a particular type of union leader) and can be dramatically enhanced by a way of structuring the relationship between law and organizing that puts the power-building question, rather than the more common question of “how can we as lawyers win a legal victory,” at center stage.

#### *A. Legal Strategies in the Jungle*

A key contextual change over time in the UFW’s story is of course first the lack, and then the emergence, of a governing law. It is important to begin this analysis, however, by challenging the concept of the “law of the jungle,” a phrase used frequently by Cohen in discussing the pre-ALRA period and later by AFL-CIO leaders looking back longingly to the time before they became ensnared in the NLRA. “Law of the jungle” implies that at the time in question there is *no law at all*, that disputes are settled by the brute strength of the powerful and the wiliness of those who might at first glance seem weak. Government, legal rules, and courts all are absent in such an account.

Despite this description, before the UFW was governed by the ALRA it operated in a world where law was very much present, either as a weapon deployed against the Union or as a resource that it came to recognize and of which it took advantage. The state was already an active participant in the struggle between growers and farm workers, and long had been. Employers demanded that the courts issue injunctions against picketers, restrict organizers’ access to the fields, and evict striking farm workers from labor camps, all for violations of criminal and property law. They called on the police to enforce those orders. Both were consistently responsive. Growers used immigration policy as a tool of labor market control, obtaining extra workers through the bracero program as long as it lasted and through various other temporary immigration programs after that, and hiring undocumented immigrants as strikebreakers with full confidence that the state would not enforce the law against their presence.

For its part, in the period before the ALRA, the UFW drew on a variety of laws—and on its own capacity to pressure those who made and enforced the law—to build the Union’s power. During that time, the UFW won the right to represent workers by generating so much pressure that a grower would agree to a union contract in order to be able to once again harvest and sell its product without interference. The most useful legal work was that which made the greatest contribution to the effort to persuade the grower to give in. Constitutional law, and the very influential example of the then ongoing civil rights movement in using constitutional law to facilitate protest and generate public support, proved critical to the UFW’s ability to sustain its strikes, pickets, and marches. It used tort law,

wage and hour law, and the minimalist California Labor Code to pepper growers with lawsuits designed both to gain redress for workers and to pressure employers to agree to union representation. It was increasingly creative in its search for new legal theories (grounded in civil rights law, antitrust, and other claims) that could stymie the grower-Teamster collaboration. In ways that were controversial even at the time (and seem more so in retrospect), it demanded that the INS enforce immigration law by hauling undocumented workers out of the fields, calling in reports on workers in particular ranches, publishing a long report on "Illegal Alien Farm Labor Activity in California and Arizona" with detailed affidavits and ranch-by-ranch statistics documenting the INS's failure to act in the face of known undocumented workers in the fields,<sup>163</sup> and eventually going so far as to set up its own patrol (the "wet line") in Arizona when it felt that the government was doing an inadequate job of policing the border.<sup>164</sup>

The so-called "law of the jungle" phase, then, was for the UFW not so much about operation in an ungoverned state of nature as it was about maneuvering to achieve the Union's goals through creative use of a wide range of laws, legal fora, and potential state interventions. This sometimes happened directly (as when the constitutional claims were successful in permitting picketing), but more often indirectly, as when depositions gave the union access to information it needed about pickets, or when a legal defeat such as a judge's refusal to mandate release of information about pesticides became a platform for the union to "raise an issue" and tell its story to the public, or when the sheer weight of the antitrust litigation led to the Teamsters' agreeing to a pact in exchange for its dismissal.

### *B. The Structure of the Relationship*

The UFW's success in integrating law and organizing was not merely the result of creative legal tactics. The internal relationship between the Union's organizing staff and its legal department was very important in facilitating the collaboration, which avoided many of the pitfalls that have plagued similar efforts.

Although it might intuitively seem that the relationship between legal and organizing strategies in an effort to achieve social change should be an easy one—after all, both are important tools in the struggle—it rarely is. Many a would-be collaboration has foundered on the rocks of tension

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163. UNITED FARM WORKERS OF AMERICA, ILLEGAL ALIEN FARM LABOR ACTIVITY IN CALIFORNIA AND ARIZONA, in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library, Box 21 Folder 444; Box 29, Folder 568.

164. Jeff Coplon, *Cesar Chavez's Fall from Grace, Part II*, THE VILLAGE VOICE, Aug. 21, 1984, at 18; FERRISS & SANDOVAL, *supra* note 32, at 244.

between lawyers and organizers about goals, methods, and leadership, among other issues. A substantial literature lays out the perils. Concern about lawyer domination is a recurring theme. Scholars and activists alike offer a panoply of examples where a lawyer's well-intentioned intervention in an ongoing organizing battle had the effect of de-mobilizing participants, turning the attorney into the "expert" and focusing the group's energy on a court case and its outcome rather than on the need to build power through collective action.<sup>165</sup>

Much of the concern about lawyer domination among scholars and activists arises in settings where the organizing effort is relatively young or weak. In such a situation, there is a heightened danger that a lawyer will be seen as the leader and that legal strategies will overtake collective ones.<sup>166</sup> In this regard, it is important that Cohen came to the UFW five years into its history, after it had already become a broad movement with a clearly defined organizing strategy, a highly visible charismatic leader, and several victories under its belt. In the case of the UFW, the Union's strength and clarity about its goals at the time it first brought Cohen on staff—and Chavez's skill at communicating those goals and in teaching Cohen to be the sort of lawyer who could advance them—proved to be critical elements of the successful collaboration. Cohen was also not on the Union's Executive Committee, he did not and could not organize groups of workers, and he did not seek to limit the Union's tactics or control its approach. Chavez respected Cohen greatly, but there was no question that Chavez was in control of the Union.

Another key element of the UFW's success in merging law and organizing strategies was that legal representation was coordinated and in large measure provided in-house. The UFW had experimented with outside lawyers initially and found them wanting. Likewise, its experience

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165. GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) 11–28; Michael J. Fox, *Some Rules for Community Lawyers*, 14 *CLEARINGHOUSE REV.* 1, 5–7 (1980); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 *HARV. C.R.-C.L. L. REV.* 407, 437–41 (1995) [hereinafter Gordon, *We Make the Road by Walking*]; Muhammad I. Kenyatta, *Community Organizing, Client Involvement, and Poverty Law*, 35 *MONTHLY REV.* 18, 22–23 (1983); William Quigley, *Reflections of Community Organizers: Lawyering for the Empowerment of Community Organizations*, 21 *OHIO N.U. L. REV.* 455, 455 (1995); White, *supra* note 42, at 755–57 and n. 209. See also books and articles on law and organizing referenced in Loretta Price and Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 *N.Y.U. REV. L. & SOC. CHANGE* 615 (2000–2001).

166. Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 *VA. L. REV.* 1103, 1141–42 (1992); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 *FORDHAM L. REV.* 2449 (1999).

with a staff lawyer whose role was largely to service members had been a frustrating one. Once Cohen joined the Union and began to build a legal department, the UFW's effort to deploy legal strategies to enhance the UFW's organizing power took off. No longer were the UFW's lawyers hemmed in by ideas about labor law steeped in the NLRA and its limitations, by government funding restrictions and by the need to represent individual farm workers to get around those restrictions, by the mission of an advocacy group, or by the limitations on time and resources imposed by pro bono attorney's obligations at an outside firm. They could experiment with the broad range of answers to the department's central charge, to put their legal skills to work "to figure out ways of generating the kind of power that's needed."<sup>167</sup>

Present as they were every day in the Union's small field offices, in the fields and in local courtrooms, these lawyers became repeat players, at once experienced with the local legal context and imbued with the feel and goals of the UFW's everyday work. All of these factors made them more likely to understand what the Union was seeking to achieve and to perceive where emerging opportunities might lie to use legal strategies to realize those aims. Equally important, having an in-house legal department gave the UFW the ability to deploy lawyers very cheaply by contrast with its opponents, who had to pay for counsel. A UFW staff attorney's annual salary cost roughly the same as two weeks of lawyer time at the rates that the Teamsters and growers had to pay private law firms for representation. While the UFW's opponents' expenses rose with each additional hour their lawyers worked, the Union's costs were both fixed and low. This effect was magnified by the incorporation of large quantities of free outside legal support, from volunteer paralegals and law students to experienced pro bono attorneys.

This in-house work was governed by a clear understanding about what the Union's lawyers were there for: to open the field for organizing and to advance the union's ultimate goal of large-scale farm worker representation. If a lawsuit worked directly or indirectly to build power in these ways, it was brought. If it did not, the Union had no interest. Directed and largely executed by the Union's own full-time lawyers, the UFW's legal strategy skirted much conflict (common in other scenarios where lawyers work to support organizing) about lawyers dictating or dominating or shutting down organizing, and about lawsuits rather than collective action taking center stage. The UFW's legal department built a tremendous amount of power for the Union. Together with strikes and the boycott, it was one of the three legs on which the organizing strategy stood. But the end goal—building a farm workers' movement and union—was

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167. Cohen Interview, *supra* note 41.



always clear, and to that end goal, lawyers were a handmaiden.

Further credit for the smooth integration of law and organizing in the union is due to Chavez's leadership, and to the way the lawyers and the organizers at the union related to each other. Ganz recalls, "Cesar . . . took the responsibility for making Jerry a respected person in the movement. . . . And Jerry was clear that Cesar was in charge. On the other hand, Jerry was never shy about saying what he thought about stuff. And so that kind of set a tone."<sup>168</sup> Organizer Jessica Govea concurred,

Cesar . . . didn't hide behind Jerry. [He] didn't hide behind—"Well, we can't do that because of the law, we can't do this because of the law." Cesar said, "We're figuring out what we have to do and we happen to have the good fortune to have Jerry here who can be . . . a part of the creating of this, because he's got a certain kind of expertise that's important."<sup>169</sup>

In turn, Cohen's attitude toward organizers facilitated the relationship. Govea believed that "Jerry's personality and the way he approached things was very key in how the legal department evolved in the union."

He wasn't saying, "Okay here's what you must do, and here's what you cannot do." . . . Jerry was saying, "What do you have to do? Now, let me help you think about your strategy. But I'm not gonna define, I'm not going to create your strategy for you. I'll help think about it. But what's most important is, you do what you have to do and let me as a lawyer figure out how you get it done." . . . [Another] thing that I think Jerry contributed to the union was . . . instead of saying "what's legal?" [he would ask], "What's right?" And then, "Let's do that." Or, "What's wrong?," and whatever's wrong, "Let's fix that."<sup>170</sup>

Cohen himself attributes the ease of collaboration to the self-confidence of lead organizers such as Chavez, Govea, Padilla, Huerta and Ganz, who did not find the law or a lawyer threatening.<sup>171</sup> As Govea concluded,

I think you need to have both, right? You need to have someone who's confident enough in their organizational skills and in their leadership position, to give room to the person who brings another kind of knowledge into the thing. And then you need to

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168. Ganz Interview, *supra* note 39. As I have noted, Chavez's trust in Cohen did not necessarily translate to confidence in the other staff attorneys. This led Chavez to believe that the legal department staff was basically fungible with any number of other lawyers, a belief that Cohen strongly resisted but which contributed to the ease with which Chavez could suggest letting the legal department go in 1978. Cohen Interview, *supra* note 41.

169. Govea Interview, *supra* note 54.

170. *Id.*

171. Cohen Interview, *supra* note 41.

have this person who brings that other knowledge, in this case, legal knowledge, understand that they're not the president of the union but they have a very important role to play from their perspective.

Finally, the UFW's legal strategy also took advantage of unique opportunities offered by its time and place. The example of the civil rights movement had a critically important influence on the UFW as a whole; the movement's use of law in tandem with organizing similarly inspired Cohen and other attorneys for the Union.<sup>172</sup> So too was the anti-war movement, with its group of lawyers working to facilitate draft resistance and public protest. The culture in the late 1960s and 1970s was particularly receptive to the emergence of a new social movement and to the call to support boycotts and protests, conveyed through legal cases as well as directly. This is not by any means to say that being a lawyer for a farm workers union in the late 1960s and early 1970s was an easy job, or that the legal strategies were obvious. But once Cohen began to develop them, the field was wide open. The convergence of the times and the legal context created a set of opportunities that others had not recognized. The routine use of property and criminal law to stymie pickets was low-hanging fruit, subject to constitutional attack. A law governing farm labor organizing had not been written. Growers did not expect, and for a number of years were unprepared for, the high-level representation that farm workers received. None of these aspects of the UFW's context obviate the tremendous creativity, dedication and persistence of Cohen and his legal team. But they will be important to keep in mind when we turn shortly to the question of the very different—in many ways polar opposite—context in which labor lawyers are operating today.

### *C. How Legal Work Is Different under a Governing Law*

Once the ALRA passed, the role of the UFW's lawyers changed. Litigation continued, but became much less central. As Cohen reflects in retrospect, before the ALRA,

[W]e were trying to use every for[u]m we could to present, not only to judges but to the public, what the problems were. And

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172. For explorations of the grassroots level legal work that accompanied organizing in the civil rights movement (beyond the better-known NAACP strategy), see J. L. CHESTNUT JR. & JULIA CASS, *BLACK IN SELMA: THE UNCOMMON LIFE OF J. L. CHESTNUT, JR.* (1990); Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 *LAW & SOC'Y REV.* 367 (2000); Thomas Hilbink, *The Profession, the Grassroots, and the Elite: Lawyering for Civil Rights in the Direct Action Era* (unpublished paper presented at the Conference on Cause Lawyering and Social Movements on March 4, 2005) (copy on file with journal).

the way we saw it . . . since there was no law regulating farm workers, we had to file . . . innovative lawsuits to raise issues. Now, once the law passed the need for doing that passed.<sup>173</sup>

The legal department's core mission was still to facilitate organizing success. But how organizing success was achieved had changed. After the ALRA, the right to represent workers could come only through victory in an ALRA-supervised election. And under those circumstances, legal resources went into shaping the ALRA to the Union's advantage and then to pursuing unfair labor practices, contesting grower appeals, and fighting to guarantee workers' the rights guaranteed them by the law. As former legal department staff (and after Cohen's departure, briefly Legal Department Director) Barbara Macri-Ortiz recalls, "The fierce war between the parties continued. Only now they fought on a different turf, and the weapons had changed: charges, counter-charges, objections, appeals and delays were the new weapons of choice."<sup>174</sup> Lawyers had to document all the ALRA claims that the unions filed, and they had to do it quickly. Cohen notes,

[W]e put ourselves under a tight gun. You had to file your objections in five days, your response in five days. We're talking 400 elections, a huge amount of work. You had to have people getting declarations. We had a lot of hearings. So you have a *huge* amount of energy into defending those election victories, which is pure legal work.<sup>175</sup>

"Once the law [was] passed," Cohen notes, the union suddenly needed "a full time big staff of . . . labor law technicians to work [the] ALRA."<sup>176</sup>

The UFW gained a tremendous amount through what it made of the opportunities the ALRA offered. But it is also true that life under a governing law created new obstacles, chief among them delay and backlash. On the ground, growers became increasingly savvy about the potential for postponing a final decision based on appeals under the ALRA, counting on the ALRB's mounting backlog and the temporary nature of farm labor to ensure that the group of workers who had voted to unionize

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173. 1993 Levy Interview with Cohen, *supra* note 64.

174. Memoir of Barbara Macri-Ortiz (1969–1990), Documentation Project, <http://www.farmworkermovement.org> (follow "Essays" link, then "Essays by Author" link, then "Barbara Macri-Ortiz 1969–1990" link).

175. Cohen Interview, *supra* note 41.

176. *Id.* Question: "Did you ever see any evidence of law, the way you practiced it, undermining organizing the way the UFW did it?" Cohen: "Certainly not before the law passed, because it was legal karate, and we were hand in glove. After the law passed, it's not that it undermines organizing, but it's that there's such a demand for people's time, testifying at hearings, to sit down for the declarations, piece together what happened in terms of developing our objections and their objections. . . . So I wouldn't say it undermined it, but it diverted energy." *Id.*

had moved on to another ranch or another state by the time their ballots were certified.<sup>177</sup> Growers reconfigured their businesses to make organizing under the ALRA more difficult, shifting out of certain crops and into others in order to evade coverage, and changing owners and business structures once the UFW prevailed in the hopes of not being labeled a “successor enterprise” required to negotiate with the Union. They also increased subcontracting, which made organizing harder despite the ALRA’s recognition of the grower, not the subcontractor, as the legally responsible employer.<sup>178</sup>

So long as the UFW retained its vibrancy and its capacity to mobilize outside pressure, however, it could respond creatively to these obstacles. After a majority of workers had voted for the UFW in an election the Union could—and did—still use social-movement style campaigns to convince growers to drop their appeals and begin contract negotiations, just as it did to pressure the ALRB when it was initially ineffective in implementing the law. As one Union volunteer (and later UFW attorney) recalls, just after the ALRA passed, union staff heard often the mantra that “‘the [ALRA] bill gives us representations; the boycott—contracts.’”<sup>179</sup> And with regard to the growers’ battles on the political front, the UFW could—and did—fight back.<sup>180</sup> For example, the union successfully advocated to defeat most grower-sponsored legislation to amend the ALRA, and Governor Brown vetoed every such bill that did pass.<sup>181</sup>

Chavez, Cohen and others understood that the ALRA would offer them only a brief window of opportunity before growers gained the knowledge and political power they needed to roll back farm workers’ new rights.<sup>182</sup> Had the UFW continued to hold up its half of the battle, it would still have had to fight growers on every front. The restructuring of the industry would have continued, to the Union’s disadvantage. Delays at the

177. The ALRB was hampered by insufficient funding from the very beginning, and accumulated a large backlog of cases within its first year. By early 1977, workers faced prospective delays of up to two years after an election for the board to certify the union as their representative. MAJKA & MAJKA, *supra* note 31, at 248.

178. Wells & Villarejo, *supra* note 32, at 309. See also Miriam J. Wells, *Legal Conflict and Class Structure: The Independent Contractor-Employee Controversy in California Agriculture*, 21 LAW & SOC. REV. 49 (1987).

179. Memoir of Mary Mecartney (1974–1993), Documentation Project, <http://www.farmworkermovement.org> (follow Essays link, then Essays by Author Link, then Mary Mecartney 1974–1993 link).

180. MAJKA & MAJKA, *supra* note 31, at 270.

181. Wells & Villarejo, *supra* note 32, at 312.

182. They often explicitly cast this analysis in terms of the 12 years of relative freedom that the labor movement enjoyed between the passage of the Wagner Act in 1935 and Taft-Hartley in 1947: “If we have to take the NL[R]A, let’s take it with 12 years of the right to boycott. . . . [W]e want what you got[,] which was 12 years of boycotting and hell-raising.” 1993 Levy Interview with Cohen, *supra* note 64.

ALRB would likely have persisted. And there might have been nothing that the UFW could have done to forestall the election of a Republican governor. But the vital UFW of the early days had faced grower opposition and Republican administrations before, and had prevailed. Given how many times the UFW had applied its spirit and creativity to develop strategies to stare down defeat in the past, it seems plausible that had it been operating at full strength it could have met these new challenges with an effective response.<sup>183</sup> Had the Union continued organizing vigorously in the early 1980s, it might have built a base of workers large enough to pull through the hard years that followed. Had so many determined, experienced organizers not been fired or left, they might have been able to work with that base to generate walk-outs that could have pressured growers to withdraw appeals and negotiate a contract to avoid watching produce rot in the fields. Had the UFW maintained its legal department at full strength, it might have been able to continue to use its young attorneys' boundless energy and its low legal costs to out-litigate the opposition, winning enough cases before the ALRB to open up some new organizing possibilities and defend some old ones. The Union might have won another five or ten years of strong organizing before having to retrench and retool its strategy. We will never know for sure.

#### IV. LABOR LAW, LABOR LAWYERS, AND UNIONS TODAY

The labor movement's current struggles may offer some indication of what the UFW would have confronted had it continued with its legal department in full force through the 1980s, as growers won control of the ALRB and succeeded in sharply reducing the agency's funding. Since John Sweeney and his slate of reformers were elected to run the AFL-CIO in 1995 on their promise of rejuvenating the labor movement, the federation has taken a strong position that organizing is imperative. Sweeney's immediate appointment of Jonathan Hiatt to the General Counsel position was one aspect of this commitment. Hiatt's long history of legal work with the SEIU, which under Sweeney's leadership in the 1980s and early 1990s became one of the AFL-CIO's most innovative and aggressive unions, had primed him for this position. Hiatt and his staff work in tandem with the legal departments of the international unions that belong to the AFL-CIO and their locals, as well as with outside labor lawyers and pro bono supporters. Attorneys for Change to Win Coalition unions are similarly dedicated and creative. But given that most of the field is occupied by a law and an agency that have become sinkholes for unions, not a source of support, the question is: can even the best team of

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183. Nathan Interview, *supra* note 51.

labor lawyers do more than nibble around the edges of the problem?

It is helpful to situate this question briefly in a look at how unions have used law over time. When Jerry Cohen was developing his approach to the law, inspiration for a young political lawyer was much more readily available from the civil rights movement than from labor, whose lawyers seemed staid and “old-school” by comparison.<sup>184</sup> But in an earlier era, lawyers had a rich history of work within the labor movement. In the 1890s and early years of the twentieth century, attorneys were constantly on call to fight the injunctions and criminal proceedings brought against unions who boycotted, picketed or struck.<sup>185</sup> Prior to and just after the Wagner Act’s becoming law, during the time of the CIO’s birth and greatest strength, labor lawyers—the category was a new one then—played a wide range of roles in supporting labor organizing. Lee Pressman, the Steel Workers Organizing Committee general counsel beginning in 1936 and general counsel to the CIO from 1937 to 1948; Maurice Sugar, the UAW’s general counsel from 1939 to 1947; and others, such as Carol Weiss King, used legal cases as a platform to publicize workers’ struggles and build solidarity among workers, helped build alliances between labor and community groups, taught workers about their rights with the goal of expanding their view of the right to organize, and created new legal theories to support controversial organizing tactics such as the sit-down strike. In addition, of course, they were instrumental in shaping the framework of legislation, judicial rulings, and the new NLRB, all in order to facilitate industrial unionism.<sup>186</sup>

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184. Sandy Nathan hadn’t even studied labor law in law school. “It didn’t have any attraction. I was more interested in the anti-war movement, the civil rights movement, and politics generally. Even though I had grown up in a small PA town where the Steelworkers were dominant, even though my dad was in a union, I didn’t see Labor Law as a place I was heading into in 1969.” Nathan Interview, *supra* note 51. Bill Carder, by contrast, had been an NLRB lawyer for three years after law school, from 1967–1970, before joining the UFW’s legal department. He recalls that the difference between what he saw at the NLRB and at the UFW was “amazing.” At the NLRB he handled numerous appeals for unions that were defeated and demoralized after being beaten, and had “handed campaigns over to the lawyers in the hope of the legal process delivering a bargaining order three years late.” The UFW, on the other hand, “had a sense of real power. They were not afraid to lose, and they didn’t quit.” Carder Interview, *supra* note 52.

185. See sources cited *supra* note 61.

186. I thank Alan Hyde for drawing my attention to this tradition in labor lawyering. See also GILBERT GALL, *PURSuing JUSTICE: LEE PRESSMAN, THE NEW DEAL, AND THE CIO* (1999); CHRISTOPHER H. JOHNSON, *MAURICE SUGAR: LAW, LABOR, AND THE LEFT IN DETROIT 1912–1950* (1988). On the role of rights in generating and advancing a broad vision of worker organizing within the labor movement in the 1920s, see James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 1013–19 (1997). On Carol King’s work with unions in the 1930s and 40s, see ANN FAGAN GINGER, *CAROL WEISS KING: HUMAN RIGHTS LAWYER, 1895–1952* (1993); see also Arthur Kinoy’s description of his own and David Scribner’s work with the labor movement during the same period. ARTHUR

As with the UFW after the passage of the ALRA, traditional labor lawyers in the aftermath of the NLRA began to work in much narrower channels. Most became technicians, steeped in the rules for organizing developed through NLRB and court decisions, skilled in shepherding a union through NLRA elections and contract negotiations and in processing grievances, but largely blinkered as to the broader question of what other kinds of law and lawyering could do for unions. There were always exceptions to the rule. Arthur Kinoy's description of his work with the United Electric Workers in the late 1940s and the 1950s, for example, falls squarely within the earlier law-as-a-tool-to-build-power tradition.<sup>187</sup> In union work as in other arenas in which a "people's lawyer" operates, Kinoy notes, success was not necessarily measured by "the technical winning or losing of the formal proceeding." "To the degree that the legal work helped to develop a sense of strength, an ability to fight back," he argues, it was successful independent of victory under the NLRA or other laws.<sup>188</sup> But by and large, labor lawyers in the second half of the twentieth century operated as NLRA technicians or specialists. This narrowing of perspective was graphically illustrated by the UFW's experience in the 1960s when it approached some of California's best labor lawyers for assistance, and found them so mired in the NLRA that they told the Union to stop carrying out its first grape boycott because it violated the NLRA's ban on secondary activity, even though the Union was not bound by federal labor law.<sup>189</sup>

Today, the universe of lawyers working to advance workers' rights is a broad and dynamic one. I will limit my discussion to union-side labor lawyers. But there is another (sometimes overlapping) group of lawyers who represent other forms of worker organizations—such as the staff attorneys, pro-bono lawyers, and law faculty who provide representation to worker centers.<sup>190</sup> Still others (again overlapping) participate in litigation and advocacy efforts on behalf of workers around the country. There is creative lawyering going on all over the country in support of efforts to enact living wage laws,<sup>191</sup> defend and expand farm workers' rights,<sup>192</sup> and

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KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER chs. 2, 3, 4, 5 (1983).

187. KINOY, *supra* note 186, at 51–59.

188. *Id.* at 57.

189. See *supra* notes 44–45 and accompanying text.

190. For descriptions of the worker center model see generally JANICE FINE, WORKERS CENTERS: ORGANIZING NEW COMMUNITIES AT THE EDGE OF THE DREAM (2006); GORDON, *supra* note 92; MIRIAM CHING YOON LOUIE, SWEATSHOP WARRIORS: IMMIGRANT WOMEN WORKERS TAKE ON THE GLOBAL FACTORY (2001).

191. On the living wage movement, see generally STEPHANIE LUCE, FIGHTING FOR A LIVING WAGE (2004). On lawyers' roles within the movement, see Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 465–72 (2001); Kathleen Erskine & Judy

enforce basic workplace protections on behalf of the lowest-wage workers.<sup>193</sup>

Workplace rights in this more comprehensive sense are emerging as a productive and exciting arena for the collaboration of lawyers and organizers, and a new field of study and inspiration for scholars.<sup>194</sup>

Contemporary union lawyers, however, have been all but ignored in academic literature, presumably on the assumption that if labor law is dead its practitioners must also be moribund. It is true that labor attorneys today still spend a great deal of time on day-to-day union work: representing union staff and members (or would-be members) during recognition campaigns, supervising elections, pursuing cases before the NLRB, taking up grievances, defending unions against members' claims of unfair or inadequate representation, and so on. Reflecting on this work, they express frustration with the seemingly endless and often fruitless struggle to surmount the legal obstacles that lie in the path of any labor organizing campaign.<sup>195</sup> But as I have noted, in the legal departments of the AFL-CIO and its member unions, of Change to Win Unions, and of innovative local efforts, labor lawyers have once again begun to grapple seriously with how to make law relevant to the rebirth of the labor movement.<sup>196</sup>

Marblestone, *The Role of Lawyers in Santa Monica's Struggle for a Living Wage* (Feb. 7, 2005) (unpublished paper presented at the Conference on Cause Lawyering and Social Movements (March 4, 2005)) (on file with Journal).

192. Fran Ansley, *Mexican Guestworkers in Carolina del Norte: Social Movement Lawyering on Transnational Ground* (unpublished paper presented at the Conference on Cause Lawyering and Social Movements (March 4, 2005)) (on file with Journal).

193. Just one example of this confluence was the convening of *Enforcing the Minimum Wage for Working Families: A Conference on New Strategies for Communities and Government*, which held at N.Y.U. Law School in March of 2005, which attracted organizers, workers' rights attorneys and government officials from all over the country. Worker centers are at the forefront of many of these efforts.

194. GORDON, *supra* note 92; Scott L. Cummings and Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 470-73 (2001); Gordon, *We Make the Road by Walking*, *supra* note 165; Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397 (2004); Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry* 1 J. GENDER RACE & JUST. 405 (1998); Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529 (2002).

195. This is evident in any conversation where labor lawyers gather to talk business, but perhaps nowhere so much as in the annual meetings of the AFL-CIO's Lawyers' Coordinating Committee.

196. The experience of first organizing "outside the law," and then being brought in under a governing framework, is common to most unions. Some were active prior to the passage of the NLRA and then brought under its ambit. Others were formed to represent workers such as farm laborers excluded from NLRA coverage. Hospital workers, written out of the NLRA, began organizing under the auspices of Retail Drug Employees Union Local 1199 in New York in 1958, sixteen years before a 1974 amendment to the NLRA set up rules for hospital worker organizing. LEON FINK & BRIAN GREENBERG, *UPHEAVAL IN THE*



What is most interesting about this work is its move away from the model of labor law practice that reigned for half a century—the technician’s command of the NLRA and the NLRB—toward a recognition of the reality that (despite the presence of a governing law that ostensibly seeks to level the playing field between workers and employers) the outcome of labor disputes is once again being argued in the court of public opinion and settled by brute displays of power. Unions, and the attorneys who represent them, have been strategizing to avoid the NLRA’s sticky web, seeking out pockets of space in which organizing feels *possible* again, unconstrained by restrictive legal rules and the molasses-like pace of NLRB and judicial decision-making. That the legal structure has not been repealed, and must still be reckoned with even as unions and their lawyers seek to avoid its grasp, adds another layer of complexity in this work.

Although there are many varieties of organizing in this new land, the core demand they share is that the employer agree to step back from a position of antagonism vis-à-vis the union, retreat from reliance on NLRA rules and NLRB procedures to create delay, and simply allow the workers to make their choice about representation. As I note in the Introduction, the labor movement has, in the past six years, moved increasingly away from NLRB-supervised elections and toward urging employers to recognize and bargain with a union once a majority of workers sign cards indicating their desire for representation, a process often called “card-check recognition.”<sup>197</sup> Where unions do not have sufficient power to win card-check, they often seek a “neutrality” agreement, by which the employer promises to refrain from doing any number of things designed to sway workers away from a vote for the union. These two types of agreements can also be combined.

It is, of course, one thing to make such requests, and quite another to have them agreed to and respected. Unchained from the supposedly equalizing armature of the NLRA, card-check campaigns bring into stark relief the question of how much resistance a particular employer is prepared to exert, and how much power a particular union has to counter that resistance. Employers rarely sign such agreements on first request.

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QUIET ZONE: A HISTORY OF HOSPITAL WORKERS’ UNION, LOCAL 1199 28 (1989). Public employees, also not covered by the NLRA, fought for many years to have their organizing efforts covered by law, and were ultimately successful, first on the state and then on the federal level. PAUL JOHNSTON, *SUCCESS WHILE OTHERS FAIL: SOCIAL MOVEMENT UNIONISM AND THE PUBLIC WORKPLACE* (1994).

197. For a very useful overview of the card-check effort and the legal arguments proffered against it, see Brudney, *supra* note 5. See also Dorothee Benz, *Sisyphus and the State: On the Front Lines of Union Organizing*, *DISSENT*, Fall 2004, at 78, 80 (citing the union preference for card check agreements as opposed to the NLRB process); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 *BERKELEY J. EMP. & LAB. L.* 369, 372 (2001) (noting increased reliance by unions on pre-recognition neutrality agreements).

Some do so in the context of an ongoing relationship with a particular union or set of unions. Others require considerable pressure before they are willing to concede. To this end, many unions today conduct "corporate" or "comprehensive" campaigns—efforts to generate negative publicity and negative economic consequences for corporations and their board members and/or to work with shareholders to elect corporate boards more sympathetic to their cause—in order to bring an employer to a point where it is willing to accede to an agreement and abide by its terms.<sup>198</sup>

Called on to facilitate card-check campaigns and their comprehensive campaign companions, lawyers have responded in a variety of ways. One has been to litigate and legislate to permit or (ideally) mandate card-check as a route to union recognition. Another has been to use a wide range of legal tactics as leverage in a comprehensive campaign, to bolster union power and batter employer resistance during the course of a card-check effort. And a third has been to use the law as a way to build public support for union organizing as an essential American right.

In the most common form of card-check campaign, unions pursue private agreements with individual corporations or clusters of companies. When card-check campaigns began to gain adherents in the labor movement in the late 1980s and early 1990s, they were usually carried out with employers whose existing workforce was already unionized. What the union sought in those cases was a commitment that if and when the employer expanded its operations (for example, by buying a new plant or building a new property), it would agree in advance to recognize the union as the representative of the new employees upon presentation of cards signed by the majority of them. Such a campaign, launched in Las Vegas in 1987 just as hotel owners there were poised to expand, resulted in the 90% rate of union representation that prevails today on the strip.<sup>199</sup> A

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198. For descriptions of comprehensive campaigns and the legal issues that they raise from the labor perspective, see David Moberg, *Labor's Capital Strategies*, in NOT YOUR FATHER'S UNION MOVEMENT 201, 203 (Jo-Ann Mort, ed., 1998); Craig Becker, "Better Than a Strike": *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 371–75 (1994); Paul More, *Protections Against Retaliatory Employer Lawsuits After BE&K Construction v. NLRB*, 25 BERKELEY J. EMP. & LAB. L. 205, 212–14 (2004); Nathan Newman, *The Conflict of the Courts: RICO, Labor, and Legal Preemptions in Union Comprehensive Campaigns*, 51 DRAKE L. REV. 307, 309–10 (2003); Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism By Labor Unions*, 96 MICH. L. REV. 1018, 1032–33 (1998). For critiques from the management perspective, see Herbert R. Northrup, *Corporate Campaigns: The Perversion of the Regulatory Process*, 23 J. LAB. RES. 345, 355 (1996); Herbert R. Northrup & Charles H. Steen, *Union "Corporate Campaigns" as Blackmail: The RICO Battle at Bayou Steel*, 22 HARV. J.L. & PUB. POL'Y 771, 845 (1999).

199. Courtney Alexander, *Rise to Power: The Recent History of the Culinary Union in Las Vegas*, in THE GRIT BENEATH THE GLITTER (Hal K. Rothman & Mike Davis eds., 2002). An advantage of carrying the card-check process out this way is that already-unionized

variation asks an already-unionized employer to require that its suppliers agree to card-check recognition for their employees.<sup>200</sup> But this strategy only works where an industry is growing or where manufacturers and suppliers are tightly networked. As the popularity of the method has risen through the 1990s and early 2000s, unions have increasingly gone beyond these limits to seek agreements directly from non-union employers.<sup>201</sup>

These agreements may promise any number of a range of things, depending on the union's strength and the employer's openness to unionization. Many agreements require neutrality.<sup>202</sup> Some of these also (and others exclusively) promise card-check recognition. Other agreements lay down the terms for recognition based on *private elections*, which are supervised by a professional labor arbitrator; *stipulated elections*, which are held under NLRB supervision but before which the parties stipulate to the "bargaining unit" of employees entitled to vote, an issue that employers can otherwise use to delay union recognition;<sup>203</sup> or *consent elections* (also NLRB-run), through which elections are held in fourteen days rather than the usual month after the union's filing of an election petition. In consent elections the employer agrees to waive pre- and post-election objections

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workers, rather than the more vulnerable workers the union has yet to organize, are asked to bear the burden of demanding that the employer agree to recognize card majorities in the future. Conversation with Dorothee Benz, Director of Communications, Communication Workers of America Local 1180, in New York, N.Y. (July 23, 2004) [hereinafter Benz Conversation].

200. For example, the UAW asks the Big Three auto producers to demand that parts suppliers agree to card-check recognition for the parts suppliers' employees before the Big Three will buy from them. Danny Hakim & Micheline Maynard, *G.M. Accord Finishes Talks For U.A.W.*, N.Y. TIMES, Sept. 19, 2003, at C1.

201. One of the largest-scale examples at the moment is a joint effort by the Teamsters and UNITE HERE to organize the 17,000 employees of the Cintas commercial laundry chain around the country. Uniform Justice Homepage, <http://www.uniformjustice.org/>. Although card-check campaigns offer part of an answer to some of the problems that unions face at this point in time, they are not a panacea. In particular, they carry no guarantee that rank and file workers will have an opportunity for leadership or even participation at decisive moments in the campaign. Like most strategies, card-check campaigns can be carried out with a top-down or a bottom-up orientation. In the top-down approach, the union leadership makes its deals with employers without consulting or involving its membership. From a bottom-up perspective, by contrast, the pressure is generated by workers and key decisions are made at the rank and file level. Benz Conversation, *supra* note 199. An analysis of current card-check campaigns along these lines is, sadly, beyond the scope of this article.

202. This may be stated in general terms or enumerated at a highly specific level of detail. Brudney, *supra* note 5, at 825–26, cites Adrienne Eaton and Jill Kriesky's study of 132 agreements negotiated by twenty-three international unions. Ninety-three percent contained a neutrality provision and 65% also guaranteed some sort of card-check recognition. *Id.*

203. See NLRB, Stipulated Election Agreement, Form NLRB-652. For another example of a stipulated election agreement, see Stipulated Election Agreement, <http://provost.cornell.edu/pdf/StipElectionAgrmt.pdf>.

and to take no appeal beyond the NLRB regional level, thus drastically cutting down on delay.<sup>204</sup> Hiatt and other union lawyers have worked with organizers to develop model language for these agreements, and they defend their legality when challenged on the grounds that they violate elements of established labor law doctrine.<sup>205</sup> In these ways, lawyers are on the front lines of the effort to craft a body of law that grants non-NLRB recognition as much or more protection from employer interference and decertification as the NLRB election.<sup>206</sup>

Where a state or locality has some authority over a group of employers, neutrality or card-check recognition can be legislatively imposed, and the past few years have seen a number of bills in this vein.<sup>207</sup> At the behest of community, labor, and religious groups, state and local legislatures have begun to mandate that companies seeking to bid for state or municipal contracts adhere to certain practices and standards in union organizing campaigns. Most of these bills have been passed since 2000, and almost all are currently the subject of cases pending at the U.S. District or Circuit Court level; their ultimate success is uncertain. One strategy is for a state or municipality to directly mandate card-check recognition for its own employees, as California does,<sup>208</sup> or for a subset of employees not covered by the NLRA, as New York does for non-NLRA private employees.<sup>209</sup> Another approach is to forbid employers who receive public money to use it to assist or deter a union organizing campaign. New York<sup>210</sup> and California<sup>211</sup> have passed such laws to apply to all state

204. See NLRB, Consent Election Agreement, Form NLRB-651. On consent elections, see Notice of Proposed Rules Governing Consent-Election Agreements, 60 Fed. Reg. 44612, 44612-44613 (July 27, 2004).

205. For an overview of the legal arguments against card check, see Brudney, *supra* note 5, at 844-64.

206. The question currently before the NLRB is whether a union recognized by the employer via card-check procedures has the same protection from decertification as one that was elected through NLRB procedures. See sources cited *supra* note 18. Another recent case has addressed the question of whether a union forgoes the protections included in a neutrality agreement when it chooses to pursue an NLRB election after the employer signs one. *Serv. Employees Int'l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977 (9th Cir. 2003), *cert. denied* 124 S. Ct. 1878 (2004) (holding that the protections still apply).

207. This discussion draws on a telephone interview with Nancy Schiffer, Associate General Counsel, AFL-CIO (May, 2, 2005).

208. CAL. GOV'T CODE § 3507.1 (West 1995). For an overview of California's legislation on this front, see John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, in 3 THE STATE OF CALIFORNIA LABOR, 2003, 157, 158-59 (Ruth Milkman ed., The Institute for Labor & Employment, 2003), available at <http://repositories.cdlibrary.org/scl2003/ch05> (describing AB1281 effective as of January 2002 which requires employer recognition of public employee unions upon presentation of a card majority).

209. Gregory DeFreitas, *Global Tension, Local Recession and Recovery Prospects: New York's Economy One Year Later*, 5 REGIONAL LAB. REV. 10 (2002).

210. N.Y. LAB. LAW § 211-a (McKinney's 2002).

contractors; other states have similar laws that apply only to one industry, as with Florida's statute that targets nursing homes<sup>212</sup> or New Jersey's Executive Order affecting purveyors of uniforms for state employees.<sup>213</sup> A third category includes the so-called "labor peace" statutes, which set out rules for organizing campaigns with the goal of avoiding the interruption of state services. The city of Milwaukee, for example, has a law requiring that companies wishing to bid with the city for contracts to transport elderly or disabled people remain neutral during any union organizing campaign and permit union organizers access to the workers.<sup>214</sup> The city of San Jose's living wage ordinance mandates that city contractors ensure "labor peace" by eschewing discrimination or intimidation of employees in retaliation for union support and requires that city contractors maintain neutrality during organizing campaigns.<sup>215</sup>

Unions often pursue these bills as a part of broad coalitions, and labor lawyers may play only advisory roles in their conception and drafting. But once the provisions become law, they are regularly challenged by employers and employer associations, who argue, among other things, that they are pre-empted by the NLRA or state law or barred by the First Amendment. Inevitably then, labor movement lawyers become drawn into litigation in state courts, as well as before the NLRB and in federal courts, defending the bills that pass. As I have noted, it is as yet unclear whether this strategy will survive legal challenge.<sup>216</sup>

For example, the California "No Public Money" law was struck down by the Ninth Circuit as pre-empted in 2004. That decision was withdrawn in 2005 but affirmed by a panel of Ninth Circuit judges shortly thereafter.<sup>217</sup> The New York law was held by a U.S. District Court judge to be pre-empted in 2005 and is on appeal to the Second Circuit.<sup>218</sup> The Milwaukee

211. CAL. GOV'T CODE §§ 16645.1-16645.8 (West 1995).

212. FLA. GENERAL LAWS Ch. 2002-231 (2002).

213. Ex. Order No. 20, 2002 N.J. LAWS 1218 (requiring that apparel purchased by the state be manufactured under specified conditions, including employer neutrality toward union organizing effects).

214. MILWAUKEE COUNTY, WISC. GENERAL ORDINANCES § 31.02(a).

215. SAN JOSE, CAL., ORDINANCE 68554 (Nov. 18, 1998).

216. Some laws—for example, the labor peace provisions of the San Jose Living Wage ordinance—have not been challenged in court. Most are currently awaiting decisions at the Circuit Court level. One—Pittsburgh's Ordinance 22, requiring contractors in state-funded hospitality projects to be party to a collective bargaining agreement with a no-strike clause—has been decisively held not preempted. *Hotel Employees and Rest. Employees Union, Local 57 v. Sage Hospitality Res., Inc.*, 390 F.3d 206 (2004), *cert. denied* 161 L. Ed. 2d 792 (2005).

217. *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004) (opinion withdrawn and rehearing granted by *Chamber of Commerce v. Lockyer*, 408 F.3d 590 (2005)); *aff'd on rehearing* by *Chamber of Commerce v. Lockyer*, 422 F.3d 973 (2005).

218. *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005).

law was upheld by a U.S. District Court judge against a preemption attack in early 2005; the appeal is pending before the Seventh Circuit.<sup>219</sup>

Some of the most creative legal work today—and that with the greatest parallels to the UFW in its “law of the jungle” days—is being done by lawyers working on comprehensive campaigns. On the theory that employers who violate labor law are likely to be violating other laws as well, lawyers work with organizers and researchers to identify areas where the corporation in question is breaking consumer, zoning, environmental, wage and hour, OSHA and other laws. The lawyers then bring suit or initiate administrative proceedings, both as a way to gain redress for the workers and as leverage against the business. In the context of comprehensive campaigns, lawsuits and public exposés about wage and hour violations, environmental hazards, and dangerous working conditions generate negative publicity that becomes an embarrassment to a company and serves as a goad to sign a recognition agreement.<sup>220</sup> In addition to the role wage suits play in comprehensive campaigns, a few unions, such as SEIU, have dedicated substantial amounts of legal resources to litigation about wage and hour violations on behalf of non-union workers, with the goal of raising the wage floor in an industry and thus decreasing the disadvantage that unionized contractors face when they face non-union competitors.<sup>221</sup> Such lawsuits also serve as a way for the union to demonstrate to workers its commitment to their well-being and its capacity to deliver concrete benefits.<sup>222</sup> For example, when SEIU offered home health care workers in California the chance to participate in a lawsuit under the Fair Labor Standards Act for underpayment of wages during the course of the union’s organizing campaign, over 30,000 workers “opted in” to the lawsuit, gaining what for many was a first experience with representation of any sort in the workplace.<sup>223</sup>

Comprehensive campaign strategies take unions and their lawyers further out on a limb than many have become used to going.<sup>224</sup> The

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219. *Metropolitan Milwaukee Ass’n of Commerce v. Milwaukee County*, 325 F.3d 879 (7th Cir. 2005).

220. See sources cited *supra* note 196.

221. See Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, N.Y. TIMES, July 13, 2005, at A1; *Nation’s Largest Janitors’ Union Leading Effort to Police Unscrupulous Practices: Workers Force Corporations to Pay Millions in Lost Wages as Lawsuits Over Unlawful Employment Practices Spread*, PR NEWSWIRE, Jan. 24, 2005. For further exploration of union litigation to enforce basic workplace rights, see generally Catherine Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. LAW 57, 59 (2002); Michael J. Hayes, *Let Unions Be Unions: Allowing Grants of Benefits During Representation Campaigns*, 5 U. PA. J. LAB. & EMP. L. 259, 283 (2003).

222. For a discussion of the ethical questions related to such lawsuits, see Fisk, *supra* note 221.

223. Telephone Interview with Jon Hiatt, General Counsel, AFL-CIO (Feb. 22, 2005).

224. My thanks to Nathan Newman for his thoughts on the legal risks of comprehensive

negative publicity that a union generates against a corporation in the course of such a campaign may become the basis for a defamation lawsuit or a tortious interference with business claim. The threat to move union pension funds out of an investment in a particular corporation might run afoul of ERISA on the grounds that it demonstrates a failure of the duty to maximize shareholder profits.<sup>225</sup> RICO has increasingly been used against unions carrying out comprehensive campaigns on the accusation that labor's alliances with consumers and shareholders constitute blackmail and should subject the union to criminal prosecution.<sup>226</sup> Although these risks are high, unions are nonetheless willing to take them because they are desperate to escape from the NLRA's straightjacket.<sup>227</sup>

A final strategy to which labor lawyers in this group contribute is public education in order to bring the lack of a real right to organize alive for politicians, religious, community leaders, and the public. Formally, labor lawyers have worked with organizers to construct parallel institutions that simultaneously publicize workers' grievances against their employers and unions' grievances against the NLRB. The Workers Rights Boards that the labor-affiliated group Jobs with Justice has created around the country are the most prominent example. Such Boards are made up of community, religious and labor leaders and are convened in cases where the NLRB has not addressed the violations of an employee's rights or lacks the power to do so, or where pervasive delays at the NLRB would prevent

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campaigns. Lawyers working on comprehensive campaigns may also be accused of using lawsuits instrumentally, as a pressure tactic. Yet, however fervent the opposition to such an approach may be on political grounds, so long as the underlying legal claim is not frivolous or brought merely to harass the opponent, it does not violate any ethical rules. Indeed, the practice of using lawsuits as leverage is commonplace among corporate attorneys who may, for example, bring a range of suits against a company seeking to acquire another business in order to pressure it into dropping the takeover attempt. See Michael Rosenzweig, *Target Litigation*, 85 MICH. L. REV. 110, 114 (1986) (citing study of ninety-five hostile bids where 63% elicited target lawsuits as a tactic to resist the takeover).

225. There is an intuitive argument to be made that since union members are the shareholders, it is in their ultimate interest to bring new blood into the labor movement, which requires organizing. However, ERISA explicitly requires that pension funds be managed to further the interests of union members as investors rather than as workers. Newman, *supra* note 198, at 341.

226. For discussion of this problem from the union prospective see Newman and Northrup & Steen, *supra* note 198; Victoria G.T. Bassetti, *Weeding RICO Out of Garden Variety Labor Disputes*, 92 COLUM. L. REV. 103, 122 (1992).

227. Cohen and other former UFW attorneys often reflect on what they gained through the feeling of having "nothing to lose." For example, Sandy Nathan remembers his eagerness to apply the lessons he had learned from the UFW in his first post-UFW job with a labor law firm in 1980. His first assignment was to represent a construction union seeking a \$5 per hour raise in negotiations over its contract. (Six years before, his first negotiation for the UFW had sought to raise by ten cents a \$2.40 per-hour wage). He quickly realized that his radical ideas were inappropriate; the construction union "had too much to lose." Nathan Interview, *supra* note 51.

justice from being done. In public meetings the Boards hear testimony from workers and others and then issue a report with their findings, which is used to further publicize the workers plight. These findings, sometimes couched as “opinions,” gain further weight from the presence on the Boards of former NLRB members such as Sarah Fox and former NLRB General Counsel Fred Feinstein.

In a similar vein, labor lawyers have also done extensive work with the media, authored academic reports, and played key roles in efforts to place violations of workers rights to organize within an international human rights framework. Among the latter, Human Rights Watch’s reports denouncing the lack of protection for worker organizing in the United States as a violation of basic human rights principles has been particularly powerful.<sup>228</sup> Much of this work feeds into the AFL-CIO’s Voice@Work initiative, an effort to create broad recognition of the importance of the right to organize and of its erosion in the United States.<sup>229</sup> Voice@Work reflects the fact that law is not the only (and often not the most powerful) force in configuring employer behavior—culture is critically important. As Hiatt is fond of noting, the “permanent replacement doctrine,” a rule that permits employers to hire permanent workers to replace their employees who have gone on strike to protest wages or working conditions, was announced by the Supreme Court in 1938 but languished nearly unused until President Reagan fired striking members of the Professional Air-Traffic Controllers Association (PATCO) in 1981. Since that culture-shifting event, without any concurrent change in law, permanent replacement of strikers has become a routine occurrence. Recognizing that meaningful change in the law is unlikely at this point, Voice@Work seeks to enact that process in reverse, by re-stigmatizing employer infringement on the right to organize.

In all of these ways, union lawyers over the past ten years have sought to avoid entanglement with current labor law. It might seem ironic, then, that the AFL-CIO is currently seeking major labor law reform that would, among other things, embed the right to card-check recognition within the NLRA framework and bring unions back into the NLRB’s orbit. In 2003 Senator Ted Kennedy (D-MA) and Representative George Miller (D-CA) introduced the “Employee Free Choice Act” into Congress; it has been re-introduced each session since then.<sup>230</sup> The AFL-CIO, which strongly

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228. LANCE COMPA, UNFAIR ADVANTAGE: WORKERS FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (Human Rights Watch, 2000), *available at* <http://www.hrw.org/reports/pdfs/u/us/uslbroo8.pdf>; LANCE COMPA, BLOOD, SWEAT AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS (Human Rights Watch, 2004), *available at* <http://www.hrw.org/reports/2005/usa0105/usa0105.pdf>.

229. AFL-CIO, Voice@Work Website, <http://www.aflcio.org/joinaunion/voiceatwork/>.

230. Employee Free Choice Act, S. 842, H.R. 1696, 109th Cong. § 1 (2005).



supports the bill, argues that its passage is critical to remove “the debilitating obstacles employers now use to block their [workers’] free choice.”<sup>231</sup> The Act would respond to major union critiques of the NLRA by requiring employers to recognize a union without an election where a majority of the employees have signed authorization cards indicating their desire to be represented by the union, establishing a process of mandatory mediation and arbitration where union and employer are not able to reach agreement on a first contract, and imposing stronger penalties on employers who violate the National Labor Relations Act during a union organizing campaign or first contract negotiation. Although there seems to be very little likelihood that the bill will pass in the current political atmosphere, it has garnered a surprising amount of support, and has become—as the AFL-CIO hoped it would be—a spur to the discussion of the need for change.

The Employee Free Choice Act (“EFCA”) offers us one last opportunity to consider what state sanction of the organizing process offers and what it takes away; and to reflect on why an organizing effort might pursue new legislation even as it struggles to disentangle itself from the grip of the law on the books.

A legal right offers a movement a leg up, but no promise that it will make it over the fence. By creating mechanisms that enshrine organizing rights in law, and by bringing the clout of the state to bear on their enforcement, a union puts itself in a better position than if it had to re-establish that right in each campaign through its own exercise of power. The temptation, of course, is to forget that in the absence of a state truly committed to economic justice, the law can only grant a movement a fraction more power than it is able to demonstrate on its own. The right to board-administered card-check recognition would not be a substitute for the need for unions to organize aggressively and creatively in order to build power.

The benefit of current (i.e., “voluntary” rather than legally mandated) card-check agreements lies not only in the fact that they avoid the problems with NLRB-supervised elections, but in that they require a union and an employer to hash out certain things about power before bargaining begins. Political scientist Dorothee Benz points out that when a union begins its campaign by seeking to win an agreement from an employer, it confronts the need to marshal and exercise power from the very beginning.<sup>232</sup> If it succeeds, it has in essence already won the employer’s assent to the bargaining process later down the line. Almost no employers who have

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231. Lauren Lazarovivi, *Union Members Mobilize to Build Support in Congress for Workers’ Freedom to Form Unions*, [http://www.aflcio.org/aboutus/thisistheafclcio/publications/magazine/0604\\_laborlaw.cfm](http://www.aflcio.org/aboutus/thisistheafclcio/publications/magazine/0604_laborlaw.cfm).

232. Dorothee Benz, *Scaling the Wall of Employer Resistance The Case for Card Check Campaigns*, NEW LAB. F., Fall/Winter 1998, at 120.

initially signed agreements wage an all-out fight at the time of negotiating the first contract.<sup>233</sup> As Benz bluntly states, “Card check strategies are thus rooted in the understanding that employers are brought to the table when they are brought to their knees, and not when a court orders them there.”<sup>234</sup> The same issue arises in a context of legislatively-mandated card-check recognition. If employers were required to recognize a card majority, as with the Employee Free Choice Act, their opposition would not automatically dissipate. It would just be channeled differently. The day of reckoning would be further delayed by EFCA’s requirement that the first contract be arbitrated if the parties can’t reach agreement, but could never be fully avoided. And NLRB control of the process would introduce new opportunities for delay. At the same time, few unions would turn down the opportunity to have card-check recognition legally guaranteed, at the very least because it would offer a new source of leverage in the effort to build and exercise collective power in the workplace.

## V. LABOR LAW AND LABOR LAWYERING

It is easy to forget, in these times of struggle for workers, that we are experiencing another remarkable moment. The fight for change at work is vibrant, varied, and widespread, if often an uphill battle (and when have things been otherwise?). Over the past decade, there has been a resurgence of interest among law students and lawyers in working to advance organizing efforts. New lawyers have begun to understand that the union movement and worker organizing more broadly is a place where their skills—deployed creatively and with respect—can offer important tools at key moments. The result is a range of collaborations that are simultaneously advancing battles on the ground and helping to build a richer theoretical understanding of how law can bolster organizing for social change.

Much of this exciting work has taken place outside of the confines of the NLRA. Yet there is no cause to romanticize what it is like to try to build a union in the absence of a law that guarantees a right to organize. To win stable contracts without legal protections for organizing is a difficult proposition. Any temptation to return to so-called “lawless” days should be quickly snuffed out by a reminder of the reality of the relentless years of anti-labor injunctions when unions were thrown upon the mercy of conservative courts around the turn of the last century, or indeed by a review of what the UFW suffered on the road to achieving its goals, the violence and the turmoil wrought by Teamster raids and grower tactics.

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233. Brudney, *supra* note 5, at 831.

234. Benz, *supra* note 231, at 126.

Two sociologists who have devoted much of their careers to studying farm labor organizing conclude that in retrospect, despite the considerable drawbacks, "a farm labor law probably offered the best hope of facilitating long-term change in agricultural labor relations."<sup>235</sup> And for all that Jon Hiatt spends his days fighting to get unions out of the swamp of the NLRA, he still gives a resounding "no" to the question of whether labor would be better off without a governing law.<sup>236</sup>

The UFW's experience and that of the labor movement as a whole suggests that unions are likely to experience a cycle with regard to a governing law that they have sought and won. The law opens up new opportunities for organizing. It promises to bring the power of the state to bear to permit collective bargaining where workers desire it; it offers unions new resources to constrain employer resistance and a new rhetoric of government support for organizing. The law does not work automatically, but strong and creative unions can hold the state to some or all of its guarantees. The question is, for how long? For as soon as the law passes, to the extent that the employers it targets are strongly opposed to unionization and find the law an impediment to their battle against it, they will launch an attack on the agency administering the law, the politicians perceived as supporting it, and aspects of the law itself.<sup>237</sup> As will be news to no student of history, administrative processes introduce administrative delay, and backlash is inevitable. In addition to the obvious route of repeal or amendment, there are many other ways for powerful opponents to invalidate a law: identifying and exploiting loopholes in the legislation; gaining political control of appointments to the agency in charge of rule-making, implementation, and enforcement; using the legislative process to reduce the agency's funding; supporting the selection of conservative judges who will interpret the law in ways that curtail its reach; re-configuring business structures to avoid the law's confines; or, most

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235. Majka & Majka, *Decline of the Farm Labor Movement*, *supra* note 143, at 15.

236. Telephone Interview with Jonathan Hiatt, General Counsel, AFL-CIO (Aug. 25, 2004).

237. This is one illustration of a central point of public choice theory. For an early classic public choice formulation of the pervasive problem of agency capture see Richard E. Stewart, *The Reformation of American Administrative Law* 88 HARV. L. REV. 1667 (1975); for a more recent application of public choice theory see JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997). Although it is beyond the scope of this article to explore the public choice implications of the interactions between the UFW, the agricultural industry lobby in California, and the ALRB, other scholars have sought to apply public choice theory to social movement contexts. JACK L. WALKER, JR., *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS AND SOCIAL MOVEMENTS* (1991); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 24-25, 82-83 (2001); David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century*, 20 COLUM. J. ENVTL. L. 145 (1995).

simply, flaunting the law outright and trusting that bureaucratic delay and minimal penalties will bring reward.<sup>238</sup>

Once this attack makes some headway, the law becomes less useful to the unions that once wished for it and won it. It becomes clearer that the same power battle continues on the new front as well as the old one. Eventually, if amendment of the law seems impossible and the union is to survive, it will move toward organizing strategies that circumvent the law and legal tactics that seek both to protect the flank of those strategies and to make their own contribution to power-building. As those new union strategies and tactics gain traction, however, their ad-hoc nature and vulnerability to employer attack become increasingly frustrating. Once again, the labor movement looks to enshrine its organizing approach in a state-administered legal framework.

If the push-pull of law felt by today's unions is inevitable, what lessons are to be learned from it?

First, seeking the aid of the state is always a double-edged sword, not only dangerous or only helpful but both simultaneously. The passage of a new law creates new obstacles and new opportunities for players already engaged in an ongoing game. By reconfiguring the rules it gives the advantage to one side or the other. The question then is, what is the law good for? And what do the players make of the new rules? As the story of the UFW and the ALRA illustrates, even the best labor law does not do its work alone. It requires a union partner that is organizing actively, is configured in a way that makes sense in light of the structure of work in the industry, and is responsive to the particular needs of the workers who are or will be its members. The danger lies in the temptation for a movement to wed its fate to a legal framework that makes government the arbiter of organizing. Given the inevitability of delay and backlash, a movement that does this is likely, in the words of Jerry Cohen, to wake up and find "an administrative . . . albatross around [its] neck."<sup>239</sup>

That a danger exists, though, is not a guarantee that a movement will fall prey to it. The transition from law as soaring eagle to law as albatross is not itself inevitable, even if it is likely. Where employers are constrained in their capacity to fight the law—or are indifferent to it—it may remain a useful tool for decades, as have the laws authorizing the unionization of public employees. In contrast with the minimal and sinking rate of private-sector union density, the level of public employee unionization—which

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238. Public choice theory has focused on the vulnerability of agencies, legislatures, and courts to capture. Several of the other tactics in this list, however, highlight ways that powerful opponents of a piece of legislation can reconfigure their firms' behavior or restructure their enterprises to put themselves beyond the scope of coverage, independent of their ability to influence state action.

239. Cohen Interview, *supra* note 41.

swiftly reached over 40% once movements to launch state and federal workers' unions took off in the 1960s and 1970s and has only fallen slightly since then<sup>240</sup>—is an important reminder of the role of context.

In the more ordinary circumstance where the cycle of law from opportunity to obstacle seems probable, the union may still have the ability to postpone the inevitable. Employer resistance does not rob a movement of its agency or its capacity to continue to work in innovative and strategic ways in the face of new challenges. The UFW's experience with Governor Jerry Brown immediately before and after the passage of the ALRA demonstrates that an avowedly pro-labor political regime offers no pass on this need to maintain an independent stance vis-à-vis the state. As Cohen later reflected, "Farm workers' history with laws are that they are on the books and they don't get enforced . . . and the trick was to let people know . . . this was one law that . . . was going to be enforced."<sup>241</sup> Whatever its hopes for a Brown administration in the abstract, the UFW quickly saw that the rules set out in the ALRA would only become reality if the union compelled Brown to make them so. Cohen again: "the Democratic administration wouldn't have enforced the law without pressure, and we gave 'em pressure. . . . It was a war until Brown understood we were damn serious about it."<sup>242</sup> This is, of course, all the truer (if also all the more difficult) when faced with politicians who are open in their dislike for unions.<sup>243</sup>

A union that does not rely on the state-run framework as a substitute for power, but instead uses it to bolster its organizing even as it maintains its capacity to bring pressure to bear outside the framework—much as the

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240. See Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density and Employment Among Public Sector Workers, 1973–2004*, <http://www.trinity.edu/bhirsch/unionstats> (follow "All Public Sector Workers" link, which appears under "Historical Tables: Union Membership, Coverage, Density, and Employment, 1973–2004") (compiling data from the Current Population Study). Some attribute this surge to the promulgation of laws permitting the unionization of state and federal employees during the same time period. *But see* JOHNSTON, *supra* note 195, at 26 (arguing that the laws were as much a product of public sector workers' movements as a source of them).

241. Cohen Interview, *supra* note 41.

242. 1993 Levy Interview with Cohen, *supra* note 64.

243. When UFW staff in the 1980s blamed the ALRB appointed by Governor Deukmejian for the union's organizing struggles, and turned toward a direct-mail boycott appeal to foster support for organizing, some who had been fired or left the union responded that they "shouldn't have let Deuk get away with it." 1993 Levy Interview with Cohen, *supra* note 64. In an op-ed published in the *Los Angeles Times* in 1986, Cohen harkened back to the early years when "the forces arrayed against the UFW were formidable: the growers, the Teamsters and a host of government officials. Yet the union prevailed." Chiding that "junk mail does not organize people; people organize people," he argued that what won the UFW its triumphs of the 1960s and 1970s was "not only the boycott but the picket line, the strike, and the aggressive use of the courts." Cohen, *supra* note 27.

UFW did in the first years after the passage of the ALRA—is at least in the short term in a stronger position with the law than without it. And in the face of the temptation to return to the so-called law of the jungle, we would also do well to keep in mind that the absence of a governing law does not guarantee a fertile field for union organizing. Far from it. It just creates a different sort of battlefield on which the same forces war.

Second, we may need to re-configure our understanding of “successful” legislation in relationship to organizing.<sup>244</sup> The world—and particularly the world of work—is a fast-changing place, even as employers’ desire to get more from their workers and to pay less remains a constant. Rather than looking for a law that will offer a permanent fix to the problems that unions face, an idea for which there is no better refutation than the ossified NLRA, perhaps it makes more sense to approach law-making as an act of creating “windows of opportunity,” as the UFW lawyers put it, windows that will shut (as windows do) but that can be used as periods in which to consolidate power and build a strong base for the next onslaught. Effective legislation and state intervention shift power but they do not eliminate it from the equation. A union that sees a law as more than just a leg up, a modicum of help, will be blindsided by the recurring need to address employers’ power head-on.

On the subject of good laws, the ALRA’s farm-labor-friendly provisions, and the UFW’s success in organizing under them during the time when the union was highly mobilized, speak to the need to think in terms of multiple forms of labor law that can accommodate and facilitate organizing in very different industries.<sup>245</sup> The NLRA was written at a time when the bulk of union organizing was taking place in an industrial setting characterized by large firms that employed their workers directly, full time, and for many years.<sup>246</sup> With a few notable exceptions for aspects of construction and garment work, its provisions reflect a monolithic view of the workplace and of the organizing process, one best suited to that predominant context. Now, service work—health care, retail, building cleaning—has overtaken factories as the mainstay of the economy and, by necessity, as the primary target for union organizing. This work tends to take place at smaller firms. Employment is structured in far more varied ways now as well; many more jobs are subcontracted, part-time or temporary.

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244. Cf. Ballam, *supra* note 3, at 477 (“In order for a reform to be successful, must it be successful forever?”).

245. On the importance of the provisions in the ALRA specifically tailored to the nature of farm work see Ontiveros, *supra* note 120, at 175.

246. “The bulk” is not to say all. Unions have made retail workers a target since at least the 1940s, and construction workers and other service employees have also been mainstays of the labor movement.

Unions have long shaped their organizing strategies around industry characteristics.<sup>247</sup> But current efforts for reform do not reflect the specific needs of workers for different rules governing organizing in different industries: labor *laws* rather than labor *law*. What about a law that created a mechanism for multi-employer bargaining where an industry was characterized by a number of small employers in close competition with each other, or guaranteed the right to call secondary consumer boycotts in heavily subcontracted industries? The UFW's experience under the ALRA suggests that such proposals, if successful, would be very useful to unions seeking to organize workers whose jobs do not fit the old industrial mold.

Third, there is a broad and changing range of possibilities for what lawyers can offer union organizing. Both the UFW story and that of the labor movement more broadly illustrate that if there is only one way to describe what good "lawyers for organizing" do—put law in the service of building the movement's power—there are many, many ways that such a goal can be realized. There are cycles here too, with bursts of creativity both during the "law of the jungle" periods where the legal landscape is up for grabs and during the "albatross" periods when unions seek to escape the clutches of the law, interspersed with periods of steadier development and exercise of technical expertise while a governing law is in effect and more or less effective.

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247. A few examples among many include construction and longshore unions, operating through union-run hiring halls, and entertainment industry unions in which workers maintain steady membership as they move from job to job. On the organizing strategies of longshore workers, see CHARLES P. LARROWE, *SHAPE-UP AND HIRING HALL: A COMPARISON OF HIRING METHODS AND LABOR RELATIONS ON THE NEW YORK AND SEATTLE WATERFRONTS* (1995); BRUCE NELSON, *WORKERS ON THE WATERFRONT* (1988); DAVID WELLMAN, *THE UNION MAKES US STRONG: RADICAL UNIONISM ON THE SAN FRANCISCO WATERFRONT*. On the entertainment industry, see *UNDER THE STARS: ESSAYS ON LABOR RELATIONS IN ARTS AND ENTERTAINMENT* (Lois S. Gray & Ronald L. Seeber eds., 1996) (analyzing unions' responses to technological advances in entertainment industry); STONE, *supra* note 7, at 220–24 (2004) (analyzing different approaches taken by NABET and IATSE in response to changes in the structure of the entertainment industry). But many unions are hampered by current law in their quest to develop forms of organizing that reflect and respond to the labor market and structure of the industry in which they work. For just one example, see Dorothy Sue Cobble's discussion of how what she terms "occupational unionism," prevalent among waitress unions in the middle of the century, offers one promising model for organizing today, and yet how many aspects of the approach are blocked by Taft-Hartley. Dorothy Sue Cobble, *Organizing the Postindustrial Workforce: Lessons from the History of Waitress Unionism*, 44 IND. & LAB. REL. REV. 419 (1991). The Taft-Hartley ban on secondary pressure is a particular obstacle in industries where employment is subcontracted, such as janitorial work. See Estlund, *supra* note 3, at 1605–08 ("[T]he law's ban on secondary boycotts constrains the means by which unions can put pressure on legally "neutral" employers..."); STONE, *supra* note 7, at 209–12 (explaining the detrimental effects on unions of the prohibition of secondary boycotts).

The story of the UFW reminds us that law and creative legal strategies can make extremely helpful contributions to building a movement, but that there is no such thing as a static relationship between the two. Organizing to win new laws is followed by organizing to make their promises real. Even where such a cycle is ongoing, passing a new law is no guarantee of a move forward in some inexorable march toward a better world. A law that makes sense in one moment of a movement's history may become an impediment to social change at a later stage. Or the movement may change in a way that renders it unable to take advantage of the law and vulnerable to attack through the very rules and structures it once championed.

Understood in this way, though, the tools that good labor legislation and good labor lawyers offer unions can be powerful indeed. These tools are less like a jack-hammer, more like a pick, moving the process of change-making incrementally along much as the ice-climber stakes out a hold to pull herself up to the next ledge. Falls are inevitable. It is not always clear which way is up. Lawyers and unions need to remain constantly alert to the balance between technical lawyering within the governing framework and opportunities to bring pressure to bear by using other sorts of laws or legal tactics. There is no one point at which victory is declared and the climb is over. As the Talmud says, "Look ahead: You are not expected to complete the task, but neither are you permitted to set it down."